STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-284

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

January 3, 1979

Mr. Joseph S. Bocchi
Education Reporter
The Leader-Herald
8 East Fulton Street
Gloversville, NY 12078

Dear Mr. Bocchi:

Thank you for your interest in the Open Meetings Law. Your inquiry concerns the status of committees designated by the Board of Education of the Gloversville Enlarged School District and their capacity to enter into executive session.

First, for reasons that will be detailed later, I believe that committees are public bodies subject to the Open Meetings Law in all respects.

Second, the phrase "executive session" has been in existence for years. Nevertheless, it was never defined until the enactment of the Open Meetings Law, which became effective in 1977. "Executive session" is defined by §97(3) of the Law (see attached) as that portion of a meeting during which the public may be excluded. Since all meetings must be convened as open meetings, it is clear that an executive session is not separate and distinct from a meeting, but rather is a portion thereof.

Further, §100(1) of the Open Meetings Law specifies the procedure for entry into executive session and limits the areas of discussion appropriate for executive session. In relevant part, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, it is clear that a public body may enter into executive session only when a motion is made to do so during an open meeting, that the motion must be carried by a majority vote of the total membership of the body, and that the subject matter intended to be discussed must be identified.

Next, the committees in question are in my opinion public bodies subject to the Open Meetings Law. The Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons... at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum. In addition, the definitions of "public body" and "quorum" indicate that any group designated to act collectively falls w thin the definitions. For example, although a governing body may consist of nine members and therefore requires a quorum of five, a committee consisting of three of the nine members would itself by a public body with a quorum requirement of two.

Second, does a committee "transact public business"? While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by a recent decision of the Court of Appeals (Orange County Publications v. Council of City of Newburgh, 60 AD 2d 409; Aff'd ____ NY 2d ____).

Third, the Committee in question performs a governmental function for a public corporation, the Gloversville Enlarged School District.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of MFY Legal Services, 402 NYS 2d 510 (1978); Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

For each of the reasons expressed above, the committees in question are in my view public bodies subject to the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enclosure

cc: Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-285

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 4, 1979

Paul J. Brinson, Esq.
Brinson & Brinson
2912 Delaware Avenue
Kenmore, New York 14217

Dear Mr. Brinson:

I have received your letter of December 28 in which several questions have been raised.

The first deals with distinctions between minutes of open meetings and executive sessions. With respect to subdivision (1) of §101 of the Open Meetings Law pertaining to minutes of open meetings, I believe that the minutes must make reference to motions, proposals, resolutions and "any other matter voted upon and the vote thereon." Stated differently, minutes of open meetings must refer to matters voted upon as well as motions, proposals and resolutions which may not have resulted in a vote or action taken. Further, as you inferred, minutes of executive sessions in my view need only make reference to action that is taken by formal vote. Therefore, minutes of open meetings must in my opinion be more expansive than minutes of executive sessions.

The second question deals with §102 insofar as it pertains to an unintentional failure to provide notice. In this regard, since §102 provides no mention of the burden of proof other than the reference to Article 78 of the CPLR, I believe that Article 78 is the basis for the standards regarding the burden of proof. Specifically, as you are aware, in an Article 78 proceeding the petitioner is required to demonstrate that a public official or body acted in an arbitrary or capricious manner or failed to perform a duty that is required to be performed by law.

Your third question concerns your capacity to sue a town clerk independently of a town board regarding the clerk's duties to keep minutes of the town meetings under §30 of the Town Law. In my opinion, the town clerk may be sued under Article 78 for failure to perform a duty required to be performed, i.e., a failure to keep minutes of town board meetings. Nevertheless, the Open Meetings Law may bring complications into such a proceeding. For example, although a clerk is required to take and maintain minutes of town board meetings, §100 of the Open Meetings Law permits a public body, such as a town board, to exclude all but the members of the public body from an executive session, including the town clerk. Therefore, a conflict between §30 of the Town Law and the Open Meetings Law could arise, if, for example, a town clerk could not be present to compile minutes of an executive session.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-286

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

January 8, 1979

Mr. Hugo V. DeCiutiis
[redacted]

Dear Mr. DeCiutiis:

I have received your letter of December 28 regarding the manner in which the Westbury School Board has acted with respect to the Open Meetings Law, and I agree with your contention that the Board's activities violated not only the spirit but also the letter of the Law.

According to your complaint, the President of the Board, Mr. William Malone, "arbitrarily decided to close the public hearing section" of a meeting. In addition, your letter indicates that Mr. Malone contended that he could unilaterally close a meeting and that the votes of the remaining six members of the Board had no relevance.

In my opinion, Mr. Malone's contentions are erroneous for several reasons. First, an executive session may be held only to discuss those matters specified in paragraphs (a) through (h) of §100(1) of the Open Meetings Law. Based upon your letter, none of the grounds for executive session could appropriately have been cited to close the meeting. Second, §100(1) provides a specific procedure for entry into executive session. In relevant part, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

In view of the foregoing, it is clear that a single member of a board cannot alone opt to enter into executive session. On the contrary, a majority of the total membership of a public body is required to pass a motion to enter into executive session that identifies the subject matter to be discussed. In addition, as mentioned previously, the subject matter of the discussion must be consistent with one or more of those listed as appropriate for executive session.

Enclosed for your consideration are copies of the Open Meetings Law and the 1978 report to the Legislature on the subject. I will also send a copy of your letter, the Law and the report to Mr. Malone.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enclosures

cc: Mr. Malone

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-993
OML-AO-287

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

January 8, 1979

Mr. John C. Baumgarten
Executive Director
Delaware Opportunities, Inc.
129 Main Street
Delhi, New York 13753

Dear Mr. Baumgarten:

I have reviewed your letters and the materials appended to them regarding your contention that Delaware County has not acted in accordance with the spirit of the Freedom of Information Law. In conjunction with the materials, I offer the following comments.

In terms of background, your questions have arisen because Delaware County has rejected applications for funding of your organization, Delaware Opportunities, Inc., and you are attempting to learn the reasons for rejection of the applications.

First, it is important to note at the outset that the Freedom of Information Law grants access to existing records. Therefore, an agency, such as the Delaware County Manpower Office, has no obligation to create records in response to requests, except in specific circumstances. Therefore, if there are no written reasons for a rejection of an application, there is no requirement that records indicating the reasons be created, unless required by provisions of law other than the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency are accessible to any person, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information appearing in §87(2)(a) through (h) of the Law. Moreover, if there is a denial of access, the reasons must be stated in writing and you must be apprised of your right to appeal to the head of

the agency or whomever has been designated to determine appeals. Section 89(4) of the Law also requires that an agency in receipt of an appeal transmit a copy of the appeal as well as the ensuing determination to this Committee. Finally, in a judicial proceeding, the agency has the burden of proving that the records withheld in fact fall within one or more of the categories of deniable information listed in §87(2).

Your central question deals with the reasons for failure by Delaware County to accept Delaware Opportunities' applications. In my opinion, there may be several means by which you can learn of the possible grounds for rejection and the reasons for rejection of an application. First, it appears that recommendations regarding the acceptance or rejection of applications are made by the Title VI Project Advisory Council. Based upon statements made by Mr. Ronovech in his letters to you and the nature and duties of the Council, it is clear that the Council is a public body subject to the Open Meetings Law. Although the Council is merely an advisory body that does not make final determinations, this Committee has consistently advised and the courts have upheld the notion that advisory bodies are public bodies that must comply with the Open Meetings Law.

Section 97(2) of the Law defines public body to include:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..."

By separating the quoted definition into its elements, one can conclude that the Council is a public body subject to the Law.

First, the Council is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority

> of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, even if the Council is not specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum.

Second, does the Council "transact public business"? While it has been argued that advisory bodies do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by a recent decision of the Court of Appeals (Orange County Publications v. Council of City of Newburgh, 60 AD 2d 409, aff'd _____ NY 2d _____, Nov. 2, 1978).

Third, the Council in question performs a governmental function for a public corporation, Delaware County.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of MFY Legal Services, 402 NYS 2d 510 (1978); Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

Further, §101 of the Open Meetings Law requires public bodies to compile minutes regarding the action taken and the proposals made during meetings. In addition, §99 of the Open Meetings Law requires that all meetings of public bodies be preceded by notice to the public and the news media. I have attached a copy of the Open Meetings Law for your consideration.

Since the meetings of the Council must be open to the public, it would appear that you or your staff may attend the meetings to attend and listen to the deliberations and decisions

that go into the making of the recommendations to approve or reject applications.

With respect to guidelines used regarding the basis for acceptance or rejection of applications, it is suggested that you request all written procedures developed by Delaware County, the New York State Department of Labor or by the Employment and Training Administration. Procedures are available under §87(2)(g)(ii) and (iii) of the Freedom of Information Law, which respectively grant access to "instructions to staff that affect the public" and "final agency policy or determinations." If there are specific standards or guidelines, you may have the ability to determine whether the reasons offered for rejection of your applications have merit, or whether they must be more specific.

There are indications that the Manpower Office, and perhaps Delaware County, have not adopted rules for the procedural implementation of the Freedom of Information Law. In this regard, the Freedom of Information Law requires the Committee on Public Access to Records to promulgate regulations which govern the procedural aspects of the Freedom of Information Law. In turn, each agency in the state must adopt regulations no more restrictive than those promulgated by the Committee. In terms of your correspondence, it appears that the Committee's regulations have not been followed. For example, both the Law [§89(3)] and the regulations [see attached, §1401.5(d)] require that a response to a request be givin within five business days of its receipt. It is noted that an agency may, but need not require that requests be made in writing. As noted earlier, §1401.7 of the regulations requires that a denial be in writing and that the person denied access be informed of his or her right to appeal. In sum, Delaware County and its Manpower Office are required to adopt regulations in accordance with those promulgated by the Committee. If they have not done so, the Freedom of Information Law has been violated.

I have enclosed for your perusal copies of the Freedom of Information Law, regulations promulgated under the Freedom of Information Law by the Committee, model regulations that can be used as a guide to compliance by agencies, and an explanatory pamphlet entitled "The New Freedom of Information Law and How to Use It." A copy of my response to you as well as the materials to which reference was made in the preceding sentence will be sent to Mr. Ronovech.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Victor Ronovech

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-288

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

January 9, 1979

Ms. Phyllis Brown
[redacted]

Dear Ms. Brown:

I have received your letter which raises questions concerning the legality of a joint meeting of the Mount Pleasant Town Board and the Pleasantville Village Board.

According to your letter the meeting was called for the purpose of discussing the budget of the Town and Village library and that the boards of both the Town and the Village must approve the budget. It is further indicated that the Town Supervisor, Mr. Rovello, did not give notice prior to the meeting and informed the news media that the meeting would be closed, for the discussion would involve "personnel and individual salaries."

In my opinion, based upon your description of the events surrounding the meeting, there were several violations of the Open Meetings Law.

First, a convening of a quorum of a public body, on notice to the members of the body, for the purpose of discussing public business is a meeting, whether or not there is an intent to take action. It is noted that despite the vagueness of the definition of "meeting" appearing in §97(1) of the Open Meetings Law, the Court of Appeals recently affirmed an expansive interpretation of the definition by the Appellate Division (see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd ____ NY 2d ____ Nov. 2, 1978). The decision upheld the notion that the entire deliberative process is intended to be open under the Law and that the designation of meetings as work sessions, briefing sessions and the like does not detract from the coverage of the Law. Consequently, the joint meeting was in my view a meeting subject to the Open Meetings Law.

Second, it is apparent from your letter that although you were aware of the meeting, it was not preceded by compliance with §99 of the Law, which requires that notice be given. The cited provision states that if a meeting is scheduled a week in advance, notice must be given to the public and the news media not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. As such, notice must be given prior to all meetings, whether regularly scheduled or otherwise.

In conjunction with the notice provisions, it is noted that §102 of the Law concerning the power to enforce its provisions states that an unintentional failure to provide notice shall not alone be grounds for judicial invalidation of action taken in violation of the Law. Nevertheless, based upon the circumstances that you described, it would appear that the failure to provide notice was not unintentional, but rather was purposeful.

Third, the term "executive session" is defined as a portion of an open meeting during which the public may be excluded [§97(3)]. Therefore, every meeting must be convened as an open meeting, and the procedure set forth in the Law for entry into executive session must be followed before a public body can discuss its business behind closed doors. Specifically, §100(1) states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

The ensuing paragraphs (a) through (h) specify and limit the matters that may appropriately be discussed in executive session. In view of the foregoing, a public body must convene an open meeting and then pass a motion during the open meeting with a majority vote of its total membership that identifies in a general manner the area of discussion intended for executive session. According to your letter, none of these steps were followed at the joint meeting.

Fourth, I agree with your contention that a discussion of specific individuals could be held in executive session, for §100(1)(f) of the Law provides that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation."

It is the Committee's contention, that the quoted provision is intended to protect personal privacy and not to shield matters of policy under the guise of privacy. As such, while a discussion of a particular individual could appropriately be held in executive session, a discussion of personnel generally or tangentially should in my opinion be discussed in full view of the public. In this regard, it is noted that a recent decision held that budgetary matters do not fall within §100(1)(f) of the Law and directed that such discussions be open to the public (Orange County Publications v. City of Middletown, Sup. Ct., Orange County, Dec. 26, 1978).

And fifth, your letter indicates that the meeting was held in the Supervisor's office, which is located in the back of the Town Hall "and that the Town Hall lobby and hallways were not lighted on the evening that the meeting was held." Here I would like to direct your attention to §98(b) of the Open Meetings Law which requires that:

> "[P]ublic bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law."

If, as you suggested, there are two meeting rooms in the Town Hall that could have been used for the meeting in question, it would appear that reasonable efforts were not made to hold the meeting in an area that would accomodate the physically handicapped as required by §98(b).

In sum, the joint meeting of the Mount Pleasant Town Board and the Pleasantville Village Board was in my opinion subject to the Open Meetings Law in all respects, it should have been preceded by compliance with the notice requirements discussed earlier, and entry into executive session should have been accomplished in accordance with the procedure for so doing that appears in §100(1) of the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: Town Board

Village Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-997
OML-AO-289

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

Basil A. Paterson

January 10, 1979

Mr. Isidore Gerber
Executive Director
Liberty Taxpayers Association
Liberty, New York 12754

Dear Mr. Gerber:

I have received your letter which raises questions concerning both the Freedom of Information Law and the Open Meetings Law. I will attempt to answer each of them.

Your first question concerns the relationship between §87(2)(c) of the Freedom of Information Law and the Village Law insofar as it pertains to the budget process. According to your letter, you believe that I have stated in the past that the Village Board of Liberty may withhold records reflective of the proposed salaries of department heads while the Village is engaged in collective bargaining negotiations with other Village employees. In all honesty, although I remember discussing this issue, I do not believe that my response was as you have presented it. Section 87(2)(c) states that an agency may withhold records if disclosure would "impair present or imminent contract awards or collective bargaining negotiations." The key word in the quoted provision is "impair." Since the proposed salaries of department heads must be contained in the tentative budget prusuant to Village Law, §5-508(3), it is clear that disclosure of such information would not "impair" the collective bargaining process. Moreover, the Freedom of Information Law is a statute of general application. In this regard, when there is a "special" statute that deals with specific records and either directs that particular records be made available or be withheld, the "special" statute prevails over the statute of general application. In this instance, the direction in the Village Law to make the records in question available supersedes any grounds for denial of access appearing in the Freedom of Information Law, such as §87(2)(c).

The second question concerns a public hearing held by the Town of Liberty Zoning Board of Appeals that dealt with a special use permit. Your letter states that notice was sent to all residents living within 500 feet of the property that was the subject of the hearing, and that one person protested the policy of enabling anyone to speak. Apparently he contended that a person may speak at a public hearing only if he or she lives within 500 feet of the property under discussion.

It is important to emphasize that the question raised does not pertain to the Open Meetings Law, but rather to a public hearing required to be held by other provisions of law. The Open Meetings Law is silent with respect to public participation. Therefore, although a public body may permit public participation at a meeting, it need not. However, it appears that the public hearing to which you referred may have been mandated by law. In this regard, case law has long held that all interested parties attending a hearing must be accorded an opportunity to be heard [see e.g., Lamb v. Town of East Hampton, 162 NYS 2d 94, 96 (1957); Rod v. Monserrat, 312 NYS 2d 377, 380 (1970)]. On the basis of the decisions of which I am aware, it appears that the Zoning Board of Appeals must provide a reasonable opportunity to permit all interested members of the public to be heard at a public hearing, and I do not believe that there is any restriction on the ability to speak based upon the proximity of ownership to the parcel that is the subject of the hearing.

The third area of inquiry concerns a situation in which the Zoning Board of Appeals, after the hearing, closed the meeting and went into executive session to discuss the property. You also stated that you have been unable to obtain minutes of the executive session or discover the nature of the Board's decision.

In my opinion, the Zoning Board of Appeals should have deliberated publicly and voted in public. It is noted that §103(1) of the Open Meetings Law exempts quasi-judicial proceedings from the coverage of the Law. Nevertheless, §105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §267(1) of the Town Law has long provided that all gatherings of town zoning boards of appeals "shall be open to the public." As such, although a town zoning board of appeals might in some instances act in a quasi-judicial capacity, §267(1) of the Town Law, which, under the circumstances, is less restrictive than the Open Meetings Law, requires that such meetings be open to the public. Consequently, it is my view that the exception for quasi-judicial proceedings is inapplicable with respect to town zoning boards of appeal. Moreover, an informal opinion rendered by the Attorney General on October 18, 1977, arrived at the same conclusion and advised that the exemption in the Open Meetings Law regarding quasi-judicial proceedings cannot be invoked by a town zoning board of appeals. Consequently, a zoning board of appeals may in my opinion enter into executive session only in accordance with the provisions of §100 of the Open Meetings Law.

Your fourth question concerns notification of a "special meeting." Section 99 of the Open Meetings Law requires that, if a meeting is scheduled at least a week in advance, notice must be given to the public and the news media at least seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. As such, notice must be given to the public and the news media prior to all meetings, whether regularly scheduled or "special," for example.

Finally, with respect to minutes, it is noted that §101 of the Open Meetings Law requires that minutes of executive sessions be compiled and made available within one week of an executive session. However, there is no time limit regarding the compilation of minutes of open meetings. To avoid situations in which minutes may not be made available until they are approved, the Committee has advised that minutes are available as soon as they exist, whether or not they have been approved. In such cases, it has been suggested that the minutes be marked "unapproved," "draft," or "non-final." By so doing, the public is apprised that the minutes are subject to change and the members of a public body are given a measure of protection.

As requested, enclosed is a copy of the Freedom of Information Law and an explanatory pamphlet on the subject, as well as the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Board of Trustees
Village of Liberty

Liberty School Board

Zoning Board of Appeals
Town of Liberty

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-290

COMMITTEE MEMBERS
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ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
Basil A. Paterson
(518) 474-2518, 2791

January 12, 1979

Professor Eleanor L. Fleming
Business Division
Hudson Valley Community College
Troy, New York 12180

Dear Professor Fleming:

I have received your letter of January 5, which raises several questions regarding the propriety of the activities of the Hudson Valley Community College Board of Trustees and its Presidential Search Committee under the Open Meetings Law.

It is noted at the outset that the key aspect of the Open Meetings Law is its definition of "meeting," which appears in §97(1) of the Law (see attached). Although the definition is somewhat vague, a recent decision of the state's highest court affirmed an expansive interpretation of the definition by the Appellate Division [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409 (1977), aff'd, _____ NY 2d _____, Nov. 2, 1978]. In brief, the Orange County case stated that the definition of "meeting" includes any situation in which a quorum of a public body convenes, on notice to the members, for the purpose of discussing or carrying on public business. As such, it is clear that the Open Meetings Law is applicable even if there is no intent to take action and regardless of the manner in which a gathering is characterized or denominated.

Your first question concerns the status of the Presidential Search Committee. Specifically, you have asked whether the Committee in question is "just a 'body of people' and not a 'public body.'" In my opinion, the Presidential Search Committee is a public body subject to the Law in all respects. The Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum.

Second, does a committee "transact public business"? While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by the Orange County decision cited earlier.

Third, the committee in question performs a governmental function for Hudson Valley Community College, and therefore for the state.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of MFY Legal Services, 402 NYS 2d 510; Pissare v. City of Flens Falls, Supreme Court, Warren County, March 7, 1978).

Your second question concerns whether search committees must announce their meetings to the public. Since committees are public bodies subject to the Open Meetings Law, they are required to comply with the notice requirements set forth in §99 of the Law. In brief, when a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than seventy-two hours prior to a meeting. If a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time before the meeting.

Third, you have asked whether a search committee meeting is a "true committee meeting" if several members are not notified. Earlier in the discussion of the scope of "public body," reference was made to the requirement that all public bodies act by means of a quorum, which is defined by §41 of the General Construction Law. One of the requirements contained within the definition is that reasonable notice be given to all the members. Consequently, in my opinion, a public body, whether it is a governing body or a committee, cannot perform any of its duties unless reasonable notice is given to the members prior to a meeting. As such, if members of the Search Committee were not given reasonable notice of a meeting, the ensuing gathering would not be a "meeting" under the Open Meetings Law. However, viewing the situation from a different perspective, the members of the Committee who were present would not have the capacity to act as a committee without having first given reasonable notice to all the members.

Your fourth question concerns whether procedural questions decided by a search committee may be denied to the public. In my opinion, all questions decided by the Committee must be made available to the public. Specifically,

§101 of the Open Meetings Law requires that minutes be taken with respect to all meetings of public bodies. In the case of an open meeting, §101(1) requires that the minutes shall consist of "a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Section 101(2) of the Law, which concerns minutes of executive sessions, requires that such minutes consist of "a record or summary of the final determination of such action, and the date and vote thereon..." It is noted that a public body may vote during a properly convened executive session, so long as the vote does not pertain to the appropriation of public monies. Further, the Open Meetings Law requires that minutes of executive session be compiled only when action is taken. In such cases, the minutes must be compiled and made available within one week of an executive session. Therefore, when action is taken regarding the adoption of procedures, the action must be noted in minutes, which are accessible.

It is also noted that the Freedom of Information Law requires that a voting record be compiled that identifies each member of a public body and the manner in which the member voted in every instance in which a vote is taken [see attached, Freedom of Information Law, §87(3)(a)].

And fifth, you have asked whether a board can "camoflage its decision by having a secret meeting and having a 'committee' make it." In this regard, the Open Meetings Law precludes secret meetings. Section 98(a) of the Law provides that all meetings must be convened as open meetings. Further, "executive session" is defined as a portion of an open meeting during which the public may be excluded [§97(3)]. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof. In addition, §100 sets forth a procedure that must be followed before a public body may discuss its business behind closed doors. In relevant part, §100(1) states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

In view of the foregoing, it is clear that a public body cannot enter into a closed session without first having convened an open meeting and following the steps described in the quoted provision.

Further, a governing body, for example, cannot shield its discussion by means of creating or designating a committee to act in its stead, for as discussed previously, committees are in my opinion public bodies subject to the Open Meetings Law as well.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Board of Trustees
Hudson Valley Community College

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-291

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

January 15, 1979

Mrs. Sally C. Lester
[redacted]

Dear Mrs. Lester:

I have received your letter of January 10 regarding the propriety of a closed session held by the Niskayuna Town Board under the Open Meetings Law.

The controversy concerns what is characterized in your letter as the Board's "regular executive session." Based upon our conversation, it appears that there is some confusion over the use of the phrase "executive session." In this regard, it is noted that "executive session" is defined by §97(3) of the Open Meetings Law as a portion of a meeting during which the public may be excluded. Further, entry into executive session must be preceded by following the procedure set forth in §100 of the Law, which also specifies and limits the subject matter that may appropriately be discussed in executive session. The grounds and procedure for entry into executive session will be discussed more fully in ensuing paragraphs.

Another point to emphasize is that, despite the vagueness of the definition of "meeting" in §97(1) of the Law, it has been interpreted expansively by the courts. Specifically, the Court of Appeals, the state's highest court, recently affirmed a decision which held that a "meeting" includes any situation in which a quorum of a public body convenes, on notice to the members, for the purpose of discussing its business (see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, affirmed _____ NY 2d _____, November 2, 1978). The decision made clear that the Law and the definition of "meeting" are applicable even if there is no intent to take action, but merely an intent to discuss, and that such gatherings are subject to the Law regardless of the manner

in which they are denominated or characterized. In sum, the Orange County case stands for the proposition that the Open Meetings Law includes the entire deliberative process within its scope.

It appears that the gathering known as the "executive session" of the Niskayuna Town Board, which is generally open to the public, is a meeting within the scope of the Open Meetings Law, even though there is no intent to take action.

Since the gathering in question was a meeting, the procedure described in §100(1) of the Law should have been followed prior to entry into a closed session. Specifically, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

In view of the foregoing, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of an open meeting. Further, a public body may enter into executive session only to discuss those subjects listed in paragraphs (a) through (h) of the cited provision.

Under the circumstances, I do not believe that any of the grounds for executive session could appropriately have been raised. Section 100(1)(h) of the Law permits a public body to enter into executive session to discuss:

> "the proposed acquisition, sale or lease of real property, but only when publicity would substantially affect the value of the property."

Nevertheless, it does not appear that the discussion dealt with matters that would arise under the cited provision.

Further, §100 permits a public body to vote during a properly convened executive session. However, if there were no grounds for executive session, any vote that was taken should have been conducted during an open meeting.

Your letter mentions that the Town Attorney was present at the so-called "executive session." In this regard, I would like to point out that §103(3) of the Law provides that matters made confidential by federal or state law are exempt from the provisions of the Open Meetings Law. In cases in which a board consults its attorney pursuant to the attorney-client relationship, such discussions would in my view be outside the scope of the Open Meetings Law, for the attorney-client relationship is privileged. It is unclear whether any of the discussion in question was held in conjunction with the attorney-client relationship. However, to the extent that the Board engaged in discussions within the attorney-client relationship, such discussions would fall outside the scope of the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: Town Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-292

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
Basil A. Paterson
(518) 474-2518, 2791

January 15, 1979

Mr. Robert D. Canham
Marcus Whitman Concerned Citizens
RD Box 9
Middlesex, New York 14507

Dear Mr. Canham:

I have received your letter of January 5 which raises several questions regarding the propriety of action taken by the Board of Education of the Marcus-Whitman Central School District under the Open Meetings Law.

Your first question concerns an executive session "to consider a proposal by district members to establish their Citizens Advisory Board". In my opinion, the discussion in question should have been held during an open meeting. It is noted at the outset that the Open Meetings Law provides that all meetings must be convened as open meetings [see attached, Open Meetings Law, §98(a)], and that an "executive session" is defined as that portion of a meeting during which the public may be excluded [§97(3)]. In addition, the areas of discussion that may be held behind closed doors are limited and specified in paragraphs (a) through (h) of §100(1) of the Law.

Relevant to your question is §100(1)(f), which permits a public body to convene an executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation...".

With respect to the provision quoted above, this Committee has consistently advised that the provision is intended to protection personal privacy and not to shield matters of

policy under the guise of privacy. A discussion regarding the creation of a citizens board would not in my view fall within any of the grounds for executive session, for it would be a policy concern. If, on the other hand the discussion pertained to the qualifications of specific individuals who might be designated to serve on a board, a discussion of the individuals could justifiably be held behind closed doors, for it would bear upon the privacy of particular individuals.

Your second question concerns the propriety of an executive session "to consider a request regarding preparation and presentation of the school budget". Again, I do not believe that any of the grounds for executive session could have appropriately been offered in this instance. Moreover, a recent decision held that a discussion of budget matters would not be a proper subject for executive session, for it would deal with "personnel" generally or tangentially rather than specific individuals (Orange County Publications v. City of Middletown, Supreme Court, Orange County, December 26, 1978).

Your third question regarding the handling of disciplinary problems on school buses is also a matter which in my view must be discussed publicly. Although your letter indicates that the discussion dealt with "a personnel matter" my rationale is the same as that offered in previous paragraphs, i.e. that a discussion of personnel generally rather than specifically must be held during an open meeting. If, however, particular individuals and their performance on the job were at issue, such discussions could in my opinion be held in executive session. Further, if the discussion dealt with specific students, it would be outside the scope of the Open Meetings Law under §103(3), which exempts from the Law matters made confidential by federal or state law. When a discussion of students arises, it would be confidenital under the Family Educational Rights and Privacy Act (20 USC 1232g) and the Open Meetings Law would not be applicable.

Finally, your fourth question concerns the status of a budget committee consisting of members of the school board. In my opinion, committees are subject to the Open Meetings Law in all respects. The Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function of the state or for an agency or department thereof..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision not a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only be means of a statutory quorum.

Second, does a committee "transact public business"? While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by the Court of Appeals in Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, ___ NY 2d ___, November 2, 1978.

Third, the committee in question performs a governmental function for a public corporation, the Marcus-Whitman Central School District.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of MFY Legal Services, 402 NYS 2d 510; Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

Since committees, are public bodies, they must comply with the notice provisions set forth in §99 of the Law. In brief, if a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than seventy-two hours before the meeting. If the meeting is scheduled less than a week in advance, notice must be given "to the extent practicable" to the public and the news media at a reasonable time prior to the meeting.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enclosure

cc: Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-293

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

Basil A. Paterson

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 16, 1979

Mr. Aaron J. Bertel
Barrett, Smith, Shapiro,
Simon & Armstrong
26 Broadway
New York, New York 10004

Dear Mr. Bertel:

I have received your letter regarding our discussion of quorum requirements and the phrase "total membership" in the Open Meetings Law with respect to the Urban Development Corporation (UDC).

Although the Committee has consistently advised that the term "quorum" should be construed according to the definition of that term appearing in §41 of the General Construction Law, I believe that the UDC may act under different quorum requirements. Section 41 of the General Construction Law, a statute of general application, provides that a quorum is a majority of the total membership of a public body, "were there no vacancies and were none of the persons or officers disqualified from acting." However, §6254(10) of the Unconsolidated Laws, which pertains to the UDC, states that:

> "[A] majority of the directors of the corporation then in office shall constitute a quorum for the transaction of any business or the exercise of any power or function of the corporation..."

The quoted provision differs from the General Construction Law in that a majority of directors "then in office," regardless of the number, may perform the duties of the corporation.

In my opinion, a "special statute," such as §6254 of the Unconsolidated Laws, supersedes a statute of general application. For the purpose of complying with the Open

Meetings Law, it is my belief that the UDC may act by means of a majority of directors "then in office," which is a "quorum" under the cited provision. It is noted that the definition of "public body" in the Open Meetings Law [§97(2)] simply makes reference to bodies that act by means of a quorum; it does not specify what constitutes a quorum.

Further, §100(1) of the Open Meetings Law, which pertains to the ability of a public body to enter into executive session, states that a majority of the total membership of a public body must adopt a motion to convene an executive session. In view of the inapplicability of §41 of the General Construction Law and the specific direction provided by §6254(10) of the Unconsolidated Laws, I believe that it would be reasonable to construe the phrase "total membership" as the number of directors of the UDC "then in office." To construe "total membership" otherwise would in my view result in an unreasonable construction of the language concerning quorum requirements and the ability to act contained in a statute that deals solely with the UDC.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-294

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

Basil A. Paterson

January 19, 1979

Warren B. Pesetsky, Esq.
Counsel to the Authority
State of New York
Executive Department
Division of Alcoholic Beverage Control
Two World Trade Center
New York, New York 10047

Dear Mr. Pesetsky:

Thank you for your thoughtful letter of January 9, which describes the nature of discussion at the meetings held by the State Liquor Authority. Your question, in short, is "whether or not the State Liquor Authority may, in its discretion, go into executive session for the purpose of considering license applications."

In my opinion, entry into executive session for the purpose of discussing a series of applications would violate the Open Meetings Law. As you are aware, §100(1) of the Law prescribes a procedure that must be followed by a public body prior to entry into executive session, and paragraphs (a) through (h) of the cited provision specify and limit the areas of discussion that may appropriately be considered in executive session. Although consideration of the financial history of applicants, for example, may be intertwined with other aspects of a discussion to grant or deny a license, I cannot in good faith advise that a blanket motion to discuss a series of license applications in executive session would comply with §100 of the Open Meetings Law. In short, I believe that the State Liquor Authority may enter into executive session only to the extent that it considers matters consistent with those subjects deemed appropriate for executive session listed in §100(1)(a) through (h) of the Law.

It is emphasized that, while a public body may convene an executive session to discuss particular subject matter, it need not. From my perspective, the grounds for

entry into executive session are based upon potential infringement upon the ability of government to perform its duties or harm to those who may be the subjects of discussion. There may be instances in which public discussion would be harmful neither to government nor the subjects of discussion, but which may legally be discussed behind closed doors. It is suggested that the members of the Authority might view the Open Meetings Law in terms of its permissive aspect, i.e., that it may but need not convene behind closed doors. If, as you have stated, approximately one hundred applications are considered at a single meeting, the degree to which public discussion would harm or compromise the privacy of applicants or infringe upon the governmental process might often be minimal.

In sum, I do not believe that a motion to enter into executive session to discuss all aspects of a group of license applications would be consistent with the Open Meetings Law, for the Law limits discussion behind closed doors to those subjects enumerated in §100(1).

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: Richard Emery

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-295

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
Basil A. Paterson
(518) 474-2518, 2791

January 24, 1979

Mr. J. Douglas Nicoll
Supervisor
Town of Glenville
127 Mohawk Avenue
Scotia, New York 12302

Dear Supervisor Nicoll:

Your inquiry concerns the advice that I gave with respect to a meeting held by the Glenville Town Board on December 20 and the newspaper article that ensued which quoted the advice that I gave.

I have reviewed my telephone log of January 2, which makes reference to a conversation with Joseph Slomka of the Schenectady Gazette. The log indicates that the conversation dealt with "notice before an unscheduled meeting."

Although I recollect the general nature of the conversation, I cannot in good faith tell you that I remember every aspect of the conversation. Nevertheless, I did make the statement that was attributed to me and I was advised by Mr. Slomka of the general subject matter of the meeting.

With respect to the opinion of your counsel, who feels that the meeting was exempt from the Open Meetings Law on the ground that it was "quasi-judicial," I believe that if I had felt that the gathering was quasi-judicial, I would have so advised Mr. Slomka. In view of the subject matter of the meeting and my statement, which concerns notice only, it is likely that I advised Mr. Slomka that the discussion could justifiably be held in executive session pursuant to §100(1)(f) of the Open Meetings Law.

It is noted that the scope of the term "quasi-judicial" is at this juncture somewhat unclear. In many cases, it may be difficult to draw a line of demarcation between what may be administrative or quasi-legislative and quasi-judicial

activity. Again, while I do not recall the specifics of my conversation with Mr. Slomka, if I believed that the proceedings were quasi-judicial, certainly I would have advised that the gathering was exempt from the Open Meetings Law.

I hope that I have been of some assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-296

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
Basil A. Paterson
(518) 474-2518, 2791

January 26, 1979

Mr. Charles Tiano
Feature Editor
Ulster County Townsman
971 Ohayo Mountain Road
Woodstock, New York 12498

Dear Mr. Tiano:

I have received your letter of January 25 pertaining to the Open Meetings Law and conflicts of interest.

The question concerning the Open Meetings Law deals with the interpretation of §100(2) which states that:

> "[A]ttendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body."

In my opinion, the quoted provision stands for the notion that when a public body enters into executive session, each of its members may be present and that persons other than members may also attend at the request of the public body. Presumably, those other than members of a public body who attend would be present for the purpose of providing expert advice or consultation, for example. In other situations, the subject of an inquiry might be invited to attend.

With respect to conflicts of interest, I feel that I cannot appropriately respond, for I lack expertise in that area. However, a copy of your letter has been transmitted to the Bureau of Legal Services of the Division of Community Affairs. One of its staff attorneys will respond to your inquiry shortly.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Bureau of Legal Services,
Division of Community Affairs

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-297

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OEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

Basil A. Paterson

January 29, 1979

Mr. Steve Wilson
WCBS-TV
524 W. 57th Street
New York, New York 10019

Dear Mr. Wilson:

I have received your letter of January 25 regarding meetings held by the New York City Board of Higher Education.

According to your letter, three types of meetings are held by the Board. The first is a regularly scheduled monthly meeting that is open to the public and held at Board headquarters. The second is a "pre-public" meeting generally scheduled an hour prior to a monthly meeting and held in a conference room inaccessible to the public. The third type of meeting is characterized as "informal" and is held two weeks prior to monthly meetings in a conference room closed to the public. Your letter further indicates that agendas are created with respect to each of the three types of meetings.

The question you have raised is whether you, as a reporter, and citizens generally, have the right under the Open Meetings Law to attend and hear discussions that transpire at the three types of meetings, whether they are characterized as "formal," "informal" or "pre-public" and whether or not votes are taken.

In my opinion, the Open Meetings Law requires that each of the meetings, as you described them, must be convened as meetings open to members of the news media and the general public.

The Open Meetings Law defines "meeting" as "the formal convening of a public body for the purpose of officially transacting public business" [see Open Meetings Law, §97(1)]. Despite its vagueness, the Court of Appeals recently affirmed

an Appellate Division decision that expansively interpreted the definition [see Orange County Publications v. Council of the City of Newburgh, 60 AD 409; aff'd 45 NY 2d 947 (1978)]. In brief, the Appellate Division stated that the term "meeting" encompasses any situation in which a quorum of a public body convenes, on notice to the members, for the purpose of discussing or carrying on its business. The decision made clear that there need not be an intent to vote or take action, but merely an intent to discuss as a body to fall within the scope of the Law. The Court also stated that gatherings characterized as "informal," or as "work sessions," "agenda sessions" and the like are meetings that must be open to the public when the ingredients described above are present.

One of the focal points of both appellate opinions is the Law's declaration of intent, which states that the public must have the ability to "attend and listen to the deliberations and decisions that go into the making of public policy." Thus, it is the entire deliberative process, and not only the act of voting or the ratification of decisions effectively made behind closed doors, that is subject to the Law.

It is emphasized that one of the criteria for the convening of a public body is based upon the definition of "quorum," which is defined by §41 of the General Construction Law. In order to convene a quorum, reasonable notice must be given to all members that the body will meet at a particular time and place. Therefore, if it is established in advance that the members will meet at a specific time and place for the purpose of discussing public business, a gathering of a quorum of the members would be considered a meeting subject to the Open Meetings Law. In such a case, the meeting would have to be preceded by compliance with the notice provisions appearing in §99 of the Law and would be required to be convened as an open meeting.

In sum, each of the meetings that you described is in my opinion subject to the Open Meetings Law if a quorum of the Board convenes, on notice, for the purpose of discussing its business, whether or not there is an intent to take action, and regardless of the manner in which the meetings are characterized.

It is noted that the Board of Higher Education may enter into executive session to discuss the subjects deemed appropriate for discussion behind closed doors, which are

enumerated in §100(1)(a) through (h) of the Law. However, since an executive session is a portion of an open meeting, a public body must convene an open meeting prior to entry into executive session.

Further, you mentioned that meetings are often held by the Board in offices that are "inaccessible" to the public. In this regard, §98(b) of the Open Meetings Law requires that public bodies "shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped..." Although it is unclear from your letter whether each site of the meetings held by the Board of Higher Education permits barrier-free access to the physically handicapped, it is clear that efforts must be made to ensure that physically handicapped individuals have the capacity to attend all meetings of the Board.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: Board of Higher Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-298

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

February 6, 1979

Mr. Bob Minzesheimer
Democrat & Chronicle
55 Exchange Street
Rochester, New York 14614

Dear Mr. Minzesheimer:

I have received your letter of February 1 regarding the propriety of a closed meeting held by the Rochester Board of Education.

According to your letter, the Board generally discusses proposed resolutions at the "weekly study sessions" and takes action regarding the resolutions by "formal" vote at its semi-weekly "official" meetings. Further, you have stated that an executive session was held at the end of a study session on January 2 during which the Board "discussed a raise for itself and for administrators not covered by union contracts."

It is noted at the outset that the Court of Appeals recently affirmed an Appellate Division decision which held that any situation in which a quorum of a public body convenes, on notice, for the purpose of discussing its business is a meeting subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering is characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d, aff'd 45 NY 2d 947]. As such, the study sessions that you described are meetings subject to the Open Meetings Law.

Further, §100(1) of the Law prescribes the procedure for entry into executive session and limits the subject matter that may be discussed in executive session. Relevant to your inquiry, a public body may enter into executive session to discuss:

> "e. collective negotiations pursuant to article fourteen of the civil service law;
>
> f. the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

The provision regarding "collective negotiations" makes reference to Article 14 of the Civil Service Law, which is commonly known as the Taylor Law. As such, discussion of contract negotiations behind closed doors is limited to those situations in which negotiations with a public employee union are involved.

The second quoted provision, §100(1)(f), has become known as the "personnel" exception to the Open Meetings Law. Nevertheless, as you stated in your news article, the word "personnel" appears nowhere in the Law. Further, this Committee has consistently advised that the cited provision is intended to protect personal privacy, not to shield discussions regarding policy under the guise of privacy.

With respect to the situation that you described, a discussion of salary increases for board members generally would not in my view fall within any of the grounds for executive session listed in the Law, and no privacy considerations could have been involved. Similarly, if the discussion concerning administrators' salaries pertained to an across the board increase for all administrators, the discussion should have been held in an open meeting. Contrarily, if the board considered raises on an individual basis for particular administrators and engaged in a review of the employment history of individual administrators, it would appear that an executive session under those circumstances would be proper. Again, however, if the discussion involved raises for administrators generally or as a group, the discussion should in my opinion have been open.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
cc: Rochester Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1028
OML-AO-299

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

February 8, 1979

Mr. Michael Fried
Producing Director
Roundabout Theatre Company
333 West 23rd Street
New York, New York 10011

Dear Mr. Fried:

I have received your letter and the attached materials regarding your inability to gain access to records in possession of the Council on the Arts.

In brief, the correspondence describes in some detail the means by which the Council on the Arts provides grants to cultural institutions. In addition, your letter indicates that determinations involving the grants are made in "strict secrecy" and that you have been unable to learn of the reasons for a denial of funding of the Roundabout Theatre Company, which employs you as its Producing Director.

Several questions have been raised concerning the interpretation of both the Freedom of Information Law and the Open Meetings Law.

Central to the controversy is the ability to gain access to minutes of meetings held by an advisory panel, and subcommittees of the Council on the Arts. According to your letter, staff recommendations regarding grants are transmitted to an advisory panel, which has the power to modify the staff's monetary recommendations and is required to act by means of a majority vote of its members. Representatives of the staff and the advisory panel then transmit the panel's recommendations to a subcommittee of the full Council consisting of gubernatorial appointees on the Council. The subcommittee has the power to increase or decrease the panel's recommendation. In turn, the subcommittee presents its recommendations to the Council at an open meeting "for a final vote and ratification." Although the

recommendations are considered at an open meeting, you have stated that the Council rarely considers or deliberates with respect to individual grant applications. On the contrary, subcommittee recommendations pertaining to specific disciplines, such as theater, dance, or visual, are accepted and ratified by the Council in the aggregate. Grant applications are in few instances reviewed individually by the full Council.

Both the advisory panel and the subcommittee, which have held closed meetings to date, are in my view public bodies subject to the Open Meetings Law. As such, they are required to convene their meetings in view of the public, comply with the notice provisions contained in §99 of the Open Meetings Law and prepare minutes reflective of any action taken during an open meeting or an executive session.

In my opinion, both committees and advisory bodies are public bodies subject to the Open Meetings Law. The Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that committees and advisory bodies are public bodies subject to the Law. For the purpose of clarity, committees, subcommittees and advisory bodies will be described as a "committee" in the ensuing paragraphs.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons... at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum. In addition, the definitions of "public body" and "quorum" indicate that any group designated to act collectively falls within the definitions. For example, although a governing body may consist of nine members and therefore requires a quorum of five, a committee consisting of three of the nine members would itself be a public body with a quorum requirement of two.

Second, does a committee "transact public business"? While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by a recent decision of the Court of Appeals (Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409; aff'd _____ NY 2d _____).

Third, the committees in question perform a governmental function for a state agency, the Council on the Arts.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of MFY Legal Services, 402 NYS 2d 510 (1978); Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

Nevertheless, a recent decision rendered by the Appellate Division, Third Department, held that a committee is not a public body because it has no power to "transact public business," but merely recommends to a governing body (Daily Gazette Co., Inc. v. North Colonie School District, January 25, 1978).

In this regard, your letter indicates that the subcommittee in question has the power to modify the recommendations submitted to it by an advisory panel. While the action of the subcommittee cannot be equated with a final determination, its activities in my view clearly constitute the transaction of public business. As stated by the Appellate Division, Second Department, in Orange County Publications v. Council of the City of Newburgh:

> "[W]e believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" [60 AD 2d 409, 415; aff'd 45 NY 2d 947].

Further, in affirming the Appellate Division decision, the Court of Appeals cited the statement of legislative declaration in the Open Meetings Law as the basis for its determination.

In sum, despite the Daily Gazette decision, it is my contention that both the advisory panel and the subcommittee are subject to the Open Meetings Law and must, therefore, create and make available minutes of their meetings reflective of their determinations.

The remaining issues concern the Freedom of Information Law. In a letter addressed to you by Robert A. Mayer, Executive Director of the Council on the Arts, "staff papers are internal working documents and are not available under the Freedom of Information Act." In my view, Mr. Mayer's statement is overly broad.

The Freedom of Information Law is based upon a presumption of access and states that all records in possession of an agency are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information listed in §87(2)(a) through (h) of the Law.

Relevant to "internal working documents" is §87(2)(g), which states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

The quoted provision contains what in effect is a double negative. Although an agency may withhold inter-agency or intra-agency materials, it must provide access to portions of such materials that consist of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations. This contention is bolstered by the contents of the letter sent to me by Mark Siegel, the Assembly sponsor of the amendments of the Freedom of Information Law. After quoting §87(2)(g), Assemblyman Siegel wrote that:

> "[F]irst, it is the intent that any so-called 'secret law' of an agency be made available. Stated differently, records or portions thereof containing any statistical or factual information, policy, or determinations upon which an agency relies is accessible. Secondly, it is the intent that written communications, such as memoranda or letters transmitted from an official of one agency to an official of another or between officials within an agency might not be made available if they are advisory in nature and contain

> no factual information upon which an agency relies in carrying out its duties. As such, written advice provided by staff to the head of an agency that is solely reflective of the opinion of staff need not be made available."

In view of the foregoing, it is likely that portions of "internal working documents" or staff memoranda are accessible. Moreover, the Council on the Arts has an affirmative duty to provide access to those portions of the records in question that are available.

Finally, having reviewed the regulations adopted by the Council on the Arts in April, 1978, I believe that there are several provisions which fail to comply with the Freedom of Information Law and the regulations promulgated by this Committee, which have the force of law.

Section 6400.2(a) requires that an application for records be made in writing "on a form to be prescribed by a records access officer." In this regard, the Committee has consistently advised that any written request that "reasonably describes" the records sought should suffice, and that a failure to use a prescribed form cannot constitute a valid ground for a denial of access [see Freedom of Information Law, §89(3)].

Subdivision (b) of the same section states that the payroll record is only available to the news media. Although the original Freedom of Information Law made reference to the news media with respect to payroll information, §87(3)(b) of the amended Law states that each agency must compile a record consisting of the name, public office address, title and salary of every officer or employee of an agency. The Law makes no distinction among applicants; if a record is available, it must be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368, NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Moreover, case law decided prior to the enactment of the Freedom of Information Law held that payroll information is available to any taxpayer [see Winston v. Mangan, 338 NYS 2d, 654, 661 (1972)].

Section 6400.3 concerning the list of records is consistent with both the regulations promulgated by the Committee and the Freedom of Information Law. However, Appendix W-1 indicates that the Council's subject matter

list makes reference only to available records. Section 87 (3)(c) of the Freedom of Information Law, however, states that each agency must maintain "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The last portion of the rules following §6400.8 states that the Council will not, according to its policy, make available certain records, including information "solicited in confidence," general correspondence and internal memos that have no effect upon the public, audits, and reports by observers and investigators concerning grant applications. In my opinion, the foregoing provisions are void. It is clear that the Committee's regulations govern only the procedural aspects of the Freedom of Information Law. They do not deal with substance, i.e. rights of access. Further, §87(1)(b) requires agencies to adopt regulations in conformity with and no more restrictive than those promulgated by the Committee. In this instance, the Council's rules deal with rights of access and in my opinion are more restrictive than the Freedom of Information Law. It is noted that similar regulations that were more restrictive than the Law were held to be void to that extent [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405]. Moreover, as noted previously, portions of general correspondence and internal memoranda may be accessible, whether or not they have direct effect upon the public. In addition, audits are clearly available. Reports by observers and investigators may be deniable in whole or in part. As such, insistence upon confidentiality by means of a blanket statement of policy in my opinion conflicts with the limited grounds for denial appearing in §87(2) of the Freedom of Information Law.

Copies of this response, regulations and model regulations prepared by the Committee, will be sent to Mr. Mayer.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.
cc: Robert Mayer

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1037
OML-AO-300

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

February 23, 1979

Mr. Arthur A. Katz
Warshaw, Burstein, Cohen
Schlesinger & Kuh
555 Fifth Avenue
New York, New York 10017

Dear Mr. Katz:

I have received your letter of February 21. Your inquiry concerns the propriety of the activities of the Zoning Board of Appeals of the Town of Mamaroneck under the Open Meetings Law, and rights of access to minutes of its meetings under the Freedom of Information Law.

According to your letter, at a meeting held on November 22, the members of the Zoning Board of Appeals left the meeting for the purpose of discussing your application for a variance. After having convened privately, the Board voted unanimously to reject the application. In addition, you have stated the minutes of the meeting in question do not indicate the nature of the discussion during the closed session.

It is noted at the outset that numerous questions have arisen regarding the proceedings of zoning boards of appeals in relation to the Open Meetings Law, for §103(1) of the Law states that its provisions are not applicable to quasi-judicial proceedings. As such, it has been argued that zoning boards of appeals are exempt from the Law to the extent that they engage in quasi-judicial proceedings. Nevertheless, this Committee has consistently advised that the exemption for quasi-judicial proceedings is inapplicable with respect to proceedings of town zoning boards of appeals.

Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §267(1) of the Town Law has long provided that all gatherings of town zoning boards of appeals "shall be open to the public." Consequently, although a town zoning board of appeals might in some instances act in a quasi-judicial capacity, §267(1) of the Town Law, which, under the circumstances, is less restrictive than the Open Meetings Law, requires that such meetings be open to the public. Therefore, it is my view that the exemption for quasi-judicial proceedings is inapplicable with respect to town zoning boards of appeals.

Moreover, an informal opinion rendered by the Attorney General on October 18, 1977, arrived at the same conclusion and advised that the exemption in the Open Meetings Law regarding quasi-judicial proceedings cannot be invoked by a town zoning board of appeals.

In view of the foregoing, I believe that a zoning board of appeals may exclude the public from its proceedings only in accordance with the provisions for executive session appearing in §100 of the Open Meetings Law. Subdivision (1) of the cited provision requires that a procedure be followed prior to entry into executive session. Specifically, §100(1) states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

In addition, the Law limits the subject matter that may be discussed in an executive session in paragraphs (a) through (h) of §100(1).

Although the Board may have identified the subject matter for discussion in its closed session of November 22, there is no indication that the procedural steps required by the Open Meetings Law were followed. Moreover, in my

opinion, no ground for executive session could have appropriately been cited. As such, it appears that the Board did not have the capacity to discuss your application behind closed doors.

With regard to the minutes of executive session in question, §101(2) of the Open Meetings Law requires that minutes of executive sessions be compiled only when determinations are made behind closed doors. Therefore, when a determination is made during an open meeting that follows deliberation in executive session, minutes of the executive session need not be compiled. Nevertheless, as noted earlier, I believe that the Board should have deliberated in open session, for the discussion was not consistent with any of the grounds for executive session enumerated in the Law.

Your letter also makes reference to a meeting of the Zoning Board of Appeals held on January 24. During the meeting, the Board "physically left the meeting" for the purpose of discussing whether or not your application for re-hearing would be heard on the merits.

My response to this situation is essentially the same as that offered concerning the closed session held on November 22. In brief, the Zoning Board of Appeals may enter into executive session only to discuss those subjects enumerated in the Law as appropriate for executive session. Based upon the contents of your letter, there was no apparent ground for executive session regarding the meeting on January 24.

Your final question concerns minutes of meetings of the Board that are not made available until they are approved by the Board at the ensuing scheduled meeting. You have indicated that the meetings are usually held approximately a month apart, and on some occasions, are as much as two months apart. Further, you have stated that unapproved minutes have been denied to date due to the absence of formal approval by the Board.

Due to the substantial lapse of time that often exists between a meeting and the approval of minutes, the Committee has consistently advised that minutes are accessible as soon as they exist, whether or not they have been approved. This stance is based upon the notion that, while unapproved minutes may not be "official", they constitute a "record" within the scope of §86(4) of the Freedom of Information Law and therefore are subject to rights of access. However, it has also been advised that the clerk or whoever maintains custody of unapproved

minutes mark the minutes as "unapproved," "draft," or "non-final" when the minutes are disclosed. By so doing, the public is given an opportunity to learn of the general nature of events that transpired at a meeting; concurrently, the members of the Board to which the minutes relate are given a measure of protection.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Mamaroneck Zoning Board of Appeals
Dorothy Miller, Town Clerk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-301

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

February 27, 1979

Mr. Isidore Gerber
Executive Director
Liberty Taxpayers Association
Liberty, New York 12754

Dear Mr. Gerber:

I have received your letter of February 16 concerning your inability to gain access to minutes of an executive session of the Board of Trustees of the Village of Liberty.

According to your letter and the attached materials, you applied to inspect the minutes of an executive session held by the Board on January 15. The executive session was held to discuss the contract between the Village and its police department. Further, in a letter addressed to you by John Crary, the Village Manager, you were advised that "no formal actions were taken at this meeting," and that "no minutes were kept."

In my opinion, the discussion in executive session was proper, for §100(1)(e) of the Open Meetings Law permits a public body to enter into executive session to discuss collective bargaining negotiations.

Moreover, under the circumstances, it appears that the Board was not required to compile minutes with respect to the executive session held on January 15. I would like to direct your attention to §101(2) of the Open Meetings Law, which states that "[M]inutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon..." In view of the foregoing, public bodies must take minutes of executive sessions only in situations in which action is taken during an executive session. Therefore, if a public body merely discusses an issue but takes no action during an executive session, there need not be minutes regarding the executive session.

Therefore, I must in this instance agree with the contention made by Mr. Crary in his letter to you dated February 13.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: John N. Crary

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1044
OML-AO-302

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

February 27, 1979

Mr. Paul A. Palmgren
[redacted]

Dear Mr. Palmgren:

Thank you for your continued interest in compliance with the Freedom of Information Law and the Open Meetings Law. Your inquiry concerns the status of collective bargaining negotiations under the Open Meetings Law and the propriety of by-laws adopted by the Jamestown Board of Education.

First, as you intimated, §100(1)(e) of the Open Meetings Law permits public bodies to discuss collective bargaining negotiations during executive session. I realize that collective bargaining is conducted in view of the public in Florida. However, I know of no instance in which collective bargaining agreements have been negotiated publicly in New York.

Second, with respect to the resolution passed by the Board on February 13 concerning the ability of the Superintendent of Schools to sign a contract between the Board and the Jamestown Principals' Association, I have no knowledge of any provision of law that would preclude such an agreement. Nevertheless, I have little expertise regarding the Education Law and you might want to contact the Office of Counsel of the Education Department to determine whether the resolution is valid.

Third, according to your letter, §9470 of the Board's by-laws states that a "[V]ote of the Board shall be upheld by the entire board after the decision is made." The intent of the quoted provision is unclear. As a general matter, the Open Meetings Law in conjunction with §1708 of the Education Law requires that boards of education act publicly. Consequently, it would appear that the intent of §9470 is to require all members of the Board of Education, including those who may have dissented with regard to a particular issue, to uphold determinations made by the Board as a body.

Fourth, §9320 of the by-laws states in part that "matters brought before the Board shall be considered absolutely confidential until they are made a matter of public record." In my opinion, the quoted provision is all but meaningless. Section 86(4) of the Freedom of Information Law defines "record" to include "any information kept, held, filed, produced or reproduced by, with or for an agency... in any physical form whatsoever..." Therefore, any information in possession of a school district would be subject to rights of access whether or not the Board has dealt with the information or has made the information "a matter of public record." Further, all records in possession of an agency, such as a school district, are available, except to the extent that §87(2)(a) through (h) of the Freedom of Information Law permits a denial of a record or portion of a record. In view of the foregoing, §9320 of the by-laws is in my view of no effect, for the Freedom of Information Law prescribes and limits the grounds for denial that may be asserted by an agency, and a school has no authority to "legislate" in a manner that conflicts with a statute passed by the State Legislature.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Jamestown School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-303

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 8, 1979

Mr. Harold Levy
[redacted]

Dear Mr. Levy:

Some time ago, you raised two questions regarding the status of the Board of Trustees of Cornell University under the New York Open Meetings Law. I apologize for the delay in response and thank you and the officials of Cornell University with whom I have had contact for your continued cooperation.

It is emphasized at the outset that the Committee on Public Access to Records is charged with the responsibility of administering and advising with respect to the Open Meetings Law. However, it has no legal authority to compel compliance with the Law. Consequently, the advice provided herein should in no way be construed as binding.

In your initial letter, the following questions were raised:

> "1. Is the Board of Trustees of Cornell University a 'public body' for the purposes of the Open Meetings Law and is Cornell therefore required to hold its trustees meetings open to the general public?
>
> 2. Is the Board of Trustees of Cornell University required to hold its meetings open to the general public whenever it discusses an agenda item which directly or indirectly affects one or more of the New York State colleges or the Cooperative Extension Program administered by Cornell?"

The focal point of the Open Meetings Law in relation to your questions is the interpretation of "public body," which is defined in §97(2) of the Law to include:

> "any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law..."

By dividing the definition into its component parts, it is clear that several conditions precedent must be met before determining that any group which acts collectively is subject to the Law.

In my view, the Board of Trustees meets the conditions to the extent indicated in the discussion presented in the ensuing paragraphs.

The Board of Trustees is an "entity" that consists of more than two members. Section 5703 of the Education Law prescribes the means by which members of the Board are appointed or elected. Further, subdivision (3) of the cited provision specifies that "[T]wenty shall constitute a quorum for the transaction of business." Therefore it is clear that the Board of Trustees is an entity consisting of two or more members that is required to act by means of a quorum.

Two questions remain. First, does the Board transact "public" business. And second, does the Board perform a "governmental function for the state or for an agency or department thereof, or for a public corporation..."

I believe that both questions can be answered by means of a review of the direction contained in the Education Law. Sections 5711 and 5712 deal respectively with the New York State Colleges of Veterinary Medicine and Agriculture and Life Sciences. Sections 5714 and 5715 deal respectively with the Colleges of Human Ecology and the New York State School of Industrial and Labor Relations. There is language contained in each of the four statutes cited indicating that the Board of Trustees transacts "public" business and performs a "governmental function" for an agency, the State University.

In each of the four provisions, reference is made to "buildings, furniture, apparatus and other property heretofore or hereafter erected or furnished by the state..." which "...shall be and remain the property of the state." More importantly, however, each of the provisions states that the property "shall be in the custody and under the control of Cornell University, as the representative of the state university trustees" (emphasis added). Stated differently, it appears that the Board of Trustees acts on behalf of State University Trustees with respect to its four statutory colleges. When the State University trustees perform analogous duties regarding the State University system, they clearly transact public business and perform a governmental function. Since the Cornell Board of Trustees performs the same duties with respect to the statutory colleges as the representative of the State University Trustees, I contend that the Board of Trustees indeed transacts "public" business and performs a "governmental function" for the State University.

I have read the cases cited by you and Mr. Stamp, the University Counsel, in your respective memoranda of law. The leading case concerning the status of Cornell University is Hamburger v. Cornell University [184 App. Div. 403; aff'd 240 NY 328 (1925)]. In this landmark decision rendered by Justice Cardozo, it was held that Cornell should be treated as a charitable institution. In addition, the Appellate Division decision stated that in the context of the dispute Cornell did not perform a governmental function. Nevertheless, in its discussion of the status of Cornell, the Court of Appeals compared Cornell to a hospital, whether "public or charitable," in terms of liability for the negligence of surgeons or physicians (240 NYS 328, 335). Although the Appellate Division made reference to Cornell's supposed non-governmental status, the Court of Appeals by analogy likened Cornell to hospitals, charitable and public. Since the Court of Appeals viewed Cornell by comparing it to both public and private institutions, I do not believe that the Hamburger decision has direct bearing or is in any way controlling with regard to cases concerning Cornell's performance of a governmental function. Similarly, the Effron decision (144 NYS 2d 565) also dealt with a negligence action. While it held that Cornell University is not a governmental agency, the factual situation also involved an allegation of negligence against an employee of the college of agriculture. It did not deal with the transaction of business, public or otherwise, or whether Cornell performs a governmental function. As such, I do not believe that Effron is controlling in this instance.

I have also reviewed opinions rendered by the Attorney General. The latest that I could locate was decided in 1951. Under the circumstances, I do not believe that any of those early and perhaps archaic opinions could have envisioned the application of a statute analogous to the Open Meetings Law. Therefore, I view your inquiry as one of first impression that must essentially be decided (perhaps judicially) in a manner separate and distinct from precedents concerning Cornell and its relationship with the State.

It is also noted that Mr. Stamp wrote in his memorandum:

> "...that Cornell has a contractual relationship with the State of New York pursuant to four specific statutes to include certain identified educational components within its overall educational function to the extent that they are supported by State appropriations. Cornell has comparable contractual relationships with several agencies of the federal government in support of its educational functions, but no one suggests that this makes Cornell an arm of the federal government, or that it is involved in a governmental function on behalf of the federal government."

If indeed Cornell merely engaged in a contractual relationship with the State, I would agree with Mr. Stamp's contention. Nevertheless, the nexus between Cornell and the State is more than contractual; it is statutory. Further, a review of §§5711 through 5715 of the Education Law in several instances clearly evidences an intent to benefit the people of New York. For example, §5712 states that "the object of said college of agriculture shall be to improve the agricultural methods of the state, to develop the agricultural resources of the state..." Similarly, §5715 states that "it is necessary that understanding of industrial and labor relations be advanced; that more effective cooperation among employers and employees and more general recognition of their mutual rights, obligations and duties under the laws pertaining to industrial and labor relations in New York state be achieved..." In view of these statements of intent and the representation of the State University trustees by the Cornell Board of Trustees, I reiterate my contention that the Board of Trustees transacts public business and performs a governmental function for the State University.

In addition, §§5708 and 5709 appear to evidence the capacity of the Board of Trustees to transact public business and perform governmental functions. For instance, Cornell University is empowered to adopt and enforce rules and regulations with regard to traffic. A violation of any such rule or regulation is determined by the New York State Vehicle and Traffic Law and may be punishable by misdemeanor or even by imprisonment. Section 5709 provides that special deputy sheriffs designated by Cornell "shall be peace officers with all the powers and duties thereof..." The special deputy sheriffs appointed must take an oath of office that is filed in the Office of the County Clerk. In this instance, it would appear that Cornell engages in the transaction of public business by performing what traditionally is considered a governmental function, i.e. law enforcement. Here Cornell in my opinion performs a governmental function for the State, as well as a public corporation, Tompkins County.

Although I believe that the Cornell University Board of Trustees transacts public business and performs a governmental function, I do not feel that its meetings must be open in their entirety. On the contrary, I believe that the Board is subject to the Open Meetings Law only to the extent that it discusses matters relative to the four statutory colleges and the law enforcement activities described in §§5708 and 5709 of the Education Law. The remainder of its deliberations that may be distinguished from business pertaining to the statutory colleges and law enforcement are in my opinion outside the scope of the Open Meetings Law, for "public" business is not transacted and no "governmental" function is performed.

In sum, the Board of Trustees of Cornell University is in my opinion subject to the Open Meetings Law to the extent that its deliberations and actions concern the statutory colleges and its oversight of law enforcement functions.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Neal Stamp

FOIL-AO-1057
OML-AO-304

COMMITTEE ON PUBLIC ACCESS TO RECORDS

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

COMMITTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 9, 1979

Gregory J. Guercio, Esq.
Campanella, Zolotorofe & Guercio
980 Old Country Road
Plainview, New York 11803

Dear Mr. Guercio:

I have received your letter regarding "the applicability of the Freedom of Information Law to Executive Sessions conducted pursuant to Education Law Section 3020(a)..." (sic. §3020-a). Despite our conversations, I am not sure what your question is. Consequently, the ensuing paragraphs will deal with §3020-a of the Education Law in relation to both the Freedom of Information Law and the Open Meetings Law.

First, with respect to the Open Meetings Law, a school board must discuss charges made against a person enjoying the benefits of tenure in executive session under §3020-a of the Education Law. In addition, it is clear that a vote regarding probable cause must be taken by a board during executive session. This differs from the manner in which votes generally may be taken by a school district. Specifically, although the Open Meetings Law permits public bodies to vote during a properly convened executive session, except when the vote concerns the appropriation of public monies, the Committee has advised that school boards may vote only during open meetings, except in accordance with §3020-a. This advice has been provided due to the language of §1708(3) of the Education Law, which has been judicially interpreted to require public voting by school boards in all instances, except in the case of §3020-a [see Kursch et al v. Board of Education, Union Free School District #1, Town of North Humpstead, Nassau County, 7 AD 2nd 922 (1959); United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, school boards may vote during an executive session regarding a determination as to whether probable cause exists.

The next step would involve a hearing held in accordance with subdivision (3) of §3020-a. Having reviewed the cited provision, it appears that the hearing would be quasi-judicial in nature and consequently would be outside the scope of the Open Meetings Law.

As you are aware, §101(2) of the Open Meetings Law requires that minutes be taken at executive sessions in which action is taken. Consequently, I believe that minutes must be compiled and made available within one week of an executive session when there is a finding of probable cause.

The minutes requirement would not apply to a hearing held under subdivision (3), however, because the requirements of the Open Meetings Law would be eradicated when an entity engages in a quasi-judicial proceeding.

Under the Freedom of Information Law, I believe that the minutes of executive session held under subdivision (2) would be available. Although the Law provides that an agency may withhold records or portions of records when disclosure would result in an unwarranted invasion of personal privacy, the Committee has advised and the courts have upheld the notion that disclosure of records relevant to the performance of the official duties of public employees would constitute a permissible as opposed to an unwarranted invasion of personal privacy.

Since a finding of probable cause would in my view be relevant to the performance of the official duties of the subject of the record, I believe that minutes containing a reference to the subject of the record are accessible.

Further, the Freedom of Information Law specifically states that each agency shall maintain a record of votes identifiable to each member in every instance in which a vote is taken [see §87(3)(a)].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:mb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-305

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 12, 1979

Mrs. Diane F. Follis
President
Haldane Parent Teachers
Association
Cold Spring-on-Hudson, New York 10516

Dear Mrs. Follis:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law, which is often described as the "Sunshine Law."

As requested, enclosed are two copies each of the Freedom of Information Law and the Open Meetings Law, as well as the Committee's reports to the Legislature on both subjects and an explanatory pamphlet regarding the Freedom of Information Law.

Your first question pertains to a situation in which a school board "...wants to discuss the possibility and the details of putting into place a procedure for the Administration to report to them about student/staff relationships..." In my opinion, the Board would be required to discuss such an issue during an open meeting.

As a general matter, the Open Meetings Law is based upon a presumption of openness. All meetings must be convened as open meetings, and executive sessions may be held only to discuss matters listed as appropriate for executive session in §100(1)(a) through (h). The most relevant ground for executive session under the circumstances is §100(1)(f), which permits a public body to enter into executive session to discuss:

> "the medical, financial, credit, or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation."

Although the quoted provision has been cited on innumerable occasions to discuss "personnel," the Committee has consistently advised that the provision is intended to protect personal privacy, not to shield matters regarding policy under the guise of privacy. Consequently, while a school board may discuss the performance of a particular teacher, for example, in executive session, a discussion concerning personnel generally would in my view be required to be discussed during an open meeting.

Second, you have asked whether the Open Meetings Law permits members of the public to attend negotiating sessions between school boards and employees. In this regard, §100 (1)(e) of the Law specifically permits a public body to exclude the public by means of an executive session to discuss collective bargaining negotiations.

Third, the question is whether "in school personnel matters" must be held during executive sessions "when an individual staff member or student is not under discussion." I believe that this question was answered by means of my response to your first question. Specifically, it is the Committee's view that personnel matters concerning public employees or students generally should be discussed during open meetings.

Fourth, you have asked what are the permissible areas of discussion for executive session. The subjects for executive session are listed in §100(1)(a) through (h) of the Law. Areas in which problems have arisen and which in the Committee's view require remedial legislation are discussed in the enclosed report to the Legislature on the Open Meetings Law.

And finally, your fifth question concerns the requirement that minutes be taken at executive sessions and whether such minutes are available to the public. The Open Meetings Law generally permits public bodies to vote during a properly convened executive session. Nevertheless, school boards of union free school districts are required to vote in public in all instances. Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting. Further, if action cannot be taken during an executive session, minutes need not be compiled.

In addition, it is noted that §87(3)(a) of the Freedom of Information Law requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-306

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 12, 1979

Mr. William L. Matthes
The Lookout
Fishkill Road
P.O. Box 205
Hopewell Junction, New York 12533

Dear Mr. Matthes:

I have received your letter of February 26, which concerns executive sessions held by the East Fishkill Town Board to discuss "litigation" and a "personnel matter." Your question is whether the grounds for executive session cited by the Board constitute adequate descriptions of the subject matter for the purpose of entry into executive session.

First, as you are aware, §100(1)(d) states that a public body may enter into executive session to discuss "proposed, pending or current litigation." Although the characterization of a matter as "litigation" may not be unquestionably clear, I believe that citing such a ground for executive session implies that a public body is discussing ongoing litigation. If that is true, I do not believe that any violation of law was committed. However, it would be advisable that a public body include greater specificity in its motion to enter into executive session to discuss "proposed, pending or current litigation."

Second, entry into executive session to discuss a "personnel matter" is in my view insufficient. Section 100(1)(f) of the Law provides that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Although the quoted provision may be construed as pertaining to "personnel," the Committee has consistently advised that this ground for executive session is largely intended to protect personal privacy, not to shield matters regarding policy under the guise of privacy. Consequently, a discussion of the employment history of an individual, for example, would be a proper subject for executive session. Contrarily, a discussion of the performance of a particular department within a town government would concern public employees tangentially or generally and would not in my view constitute a proper subject for executive session. As such, I do not believe that the characterization of a discussion in executive session as a "personnel matter" is a sufficient basis for entry in executive session.

Your letter also indicates that the discussion of the "personnel matter" was held by a quorum of the Town Board prior to a meeting scheduled for 8 p.m. In this regard, the Court of Appeals in Orange County Publications v. Council of the City of Newburgh, (45 NY 2d 947) held that any convening of a quorum of a public body, on notice to the members, for the purpose of discussing public business, is a meeting subject to the Open Meetings Law, regardless of the manner in which it is characterized. Consequently, even if the discussion could have properly been held in executive session, the Board should have convened an open meeting to enter into executive session as required by §100 of the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: East Fishkill Town Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1062
OML-AO-307

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 13, 1979

Mr. Harry G. Gutheil, Jr.
Trustee
Village of South Glens Falls
21 Spring Street
So. Glens Falls, New York 12801

Dear Mr. Gutheil:

I have received your letter of March 5, in which several questions concerning both the Freedom of Information Law and the Open Meetings Law have been raised.

Your first question is whether it is permissible "to show copies of treasurer's reports, bank statements and village budgets to residents during an election campaign." In my opinion, it is not only permissible to provide access to the records in question, but it is required to provide access to any person under the Freedom of Information Law.

It is noted at this juncture that the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency are available, except to the extent that records or portions of records fall within one or more specified categories of deniable information appearing in §87(2)(a) through (h) of the Law (see attached).

Treasurer's reports, bank statements and budgets constitute "statistical or factual tabulations or data" and may be reflective of final determinations. Therefore, they are in my opinion clearly accessible [see §87(2)(g)].

Your second question concerns situations in which a consensus is reached regarding specific line items in a budget during budget workshops, and whether minutes and a record of each board member's position must be recorded. The question in this instance can be answered by means of a review of the Open Meetings Law. First, budget workshops are meetings within the scope of the Open Meetings Law that must be open to the public. Recently, the Court of Appeals,

the state's highest court, affirmed an Appellate Division decision which held that any gathering of a quorum of a public body, on notice to the members, for the purpose of discussing public business is a meeting, regardless of the manner in which it is characterized (see Orange County Publications v. Council of the City of Newburgh, 60 AD 409, aff'd 45 NY 2d 947).

Next, §101 of the Open Meetings Law requires that minutes be taken at all meetings "which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Although questions have arisen regarding the sense of the word "formally," I believe that a consensus is the equivalent of a formal vote when a public body relies upon a consensus in the performance of its duties. In addition, §87(3)(a) of the Freedom of Information Law requires that a public body compile a voting record that identifies each member in every instance in which a member votes.

Your third question pertains to a discussion of proposals to be offered to a negotiating unit during an executive session and whether the positions of the members must be recorded. While §101(2) of the Open Meetings Law requires that minutes of action taken during executive session be recorded and made available within a week of the executive session, it is likely that the substance of the action taken may be deniable under the Freedom of Information Law, for the substance concerns collective bargaining negotiations. The Freedom of Information Law permits an agency to withhold records or portions thereof which "if disclosed would impair present of imminent contract awards or collective bargaining negotiations." Depending upon the circumstances, it is possible that premature disclosure of records relative to the collective bargaining process could impair the progress of the negotiations and place government in a disadvantageous position. To that extent, the records may be withheld.

Your last question deals with a decision made by a village board of trustees regarding streets that should be resurfaced. In my opinion, a discussion of resurfacing streets must be discussed during an open meeting, for there would be no appropriate ground for discussion in executive session [see attached Open Meetings Law, §100(1)]. Further, as indicated previously, a public body is required to compile minutes that indicate the nature of action taken, as well as the vote of each member who voted.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1063
OML-AO-308

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 14, 1979

Mr. Arthur G. Becker
Superintendent of Schools
South Country Central School District
Administrative Offices
189 North Dunton Avenue
East Patchogue, New York 11772

Dear Mr. Becker:

Thank you for your thoughtful letter of March 7, in which you have raised questions regarding both the Freedom of Information Law and the Open Meetings Law.

Your first question concerns a contention made by a citizen that the School Board must read personnel recommendations "item by item, to the public" during a meeting. Contrarily, you have stated that your attorney has advised that it is sufficient merely to say "[M]ove personnel changes as recommended by the administration." Further, you have indicated that you believe that the Board may vote on personnel items during an executive session and withhold the results until a week after the executive session.

There is no requirement in the Open Meetings Law or any other provision of law of which I am aware that requires that a board read the recommendations in question "item by item."

Second, as you have stated, a public body, such as a school board, may enter into executive session to discuss:

> "the medical, financial, credit, or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation" [see attached Open Meetings Law, §100(1)(f)].

It is noted, however, that the quoted provision has been cited throughout the state to discuss matters of policy that deal generally or tangentially with "personnel." In this regard, the Committee has consistently advised that §100(1)(f) is intended to protect privacy, not to shield discussions regarding policy under the guise of privacy. Consequently, a discussion regarding specific individuals could in my view justifiably be held in executive session. Contrarily, a discussion concerning personnel generally or as a group would be required to be discussed during an open meeting.

Based upon the materials appended to your letter, it appears that the discussion in executive session dealt with a number of specific individuals and specific aspects of their employment. As such, I believe that an executive session would be proper. Further, I believe that a single motion to discuss several public employees would be proper, so long as the discussion behind closed doors is consistent with the subject matter identified in the motion to enter into executive session.

With respect to voting, the Open Meetings Law permits voting during executive session, except when a vote concerns the appropriation of public monies. Nevertheless, I believe that school boards are required to vote in public in all instances, except in accordance with §3020-a of the Education Law. Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be

> taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708 (3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

In addition, it is noted that §87(3)(a) of the Freedom of Information Law (see attached) requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

In view of the foregoing, if a school board is precluded from voting during an executive session, minutes of an executive session need not be compiled, and action must be taken during an open meeting.

Your second question concerns rights of access to tape recordings of meetings. A recent decision rendered by the Supreme Court, Nassau County, held that a tape recording of a school board meeting constitutes a "record" subject to rights of access granted by the Freedom of Information Law [see §86(4)] and that the tape recording is available and must be reproduced on request (see attached, Zaleski v. Hicksville Union Free School District).

Ancillary to your question is the ability to erase or otherwise destroy the tape recording. As you are aware, the State Education Department has promulgated numerous schedules regarding the retention and disposal of records pursuant to §65-b of the Public Officers Law. If destruction or disposal of a record is not covered by a specific schedule, which is likely the case with respect to tape recordings, a record cannot be destroyed without the consent of the Commissioner of Education. It is suggested that you contact the Department of Education to obtain permission to dispose

of or erase tape recordings and perhaps seek the issuance of a schedule that permits you and other school boards to erase tape recordings as soon as minutes are compiled.

The third question also concerns a demand by a citizen that a school board read a list identifiable to some 150 teachers containing information regarding class size. Again, I know of no provision of law that requires any public body to read or detail all of the information that is considered at an open meeting. As such, I agree with your contention that items before the Board need not be read in their entirety at a meeting.

Lastly, you have discussed your policy concerning public participation at meetings. In this regard, the Open Meetings Law is silent with respect to public participation; it merely grants the public the right to attend and listen to the deliberations and the decision making process of public bodies. As a general matter, the courts have long held that a public body may adopt reasonable rules to govern its own proceedings. Therefore, so long as your rules or policies concerning public participation are reasonable, they are in my view proper. Further, you have indicated that no time limit has been placed upon the length of time that a person may speak. In my view, it would not be unreasonable to adopt a rule that specifies a time limit, as long as this limitation is applied equally to all persons who wish to speak.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-309

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 19, 1979

Ms. Lee Rosenbaum
Associate Editor
ARTnews
122 East 42nd Street
New York, New York 10017

Dear Ms. Rosenbaum:

I have received your letter of March 13 in which you have asked whether the "annual policy meeting" of the Council on the Arts falls within the scope of the Open Meetings Law. Your letter indicates that the Council has in the past refused your requests to attend the annual policy meeting. During our conversation this afternoon, you stated that representatives of the Council had prohibited public attendance on the ground that the Council takes no action at such meetings, but merely discusses policy.

In my opinion, the "annual policy meeting" is subject to the Open Meetings Law in all respects.

Despite the vagueness of the definition of "meeting" appearing in §97(1) of the Open Meetings Law, the Court of Appeals recently affirmed an Appellate Division decision which held that any convening of a quorum of a public body, on notice, for the purpose of discussing public business, is a "meeting" within the framework of the Open Meetings Law (see enclosed, Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947). Moreover, the Appellate Division emphasized that work sessions, agenda sessions and similar gatherings, during which there is no intent to act are meetings subject to the Open Meetings Law, regardless of the manner in which they are characterized or the absence of an intent to take action.

In view of the foregoing, if the ingredients described above, the convening of a quorum, on notice to the members, for the purpose of discussing public business, will be present

with respect to the annual policy meeting of the Council on the Arts, the meeting must in my opinion be open to the public and preceded by compliance with the notice requirements imposed by §99 of the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: Robert Mayer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-310

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 19, 1979

Mr. Paul A. Palmgren
[redacted]

Dear Mr. Palmgren:

I have received your letter of March 14. As requested, I will comment with respect to the eighth and ninth paragraphs of your letter.

The first question concerns the exception in the Open Meetings Law for executive sessions held to discuss collective bargaining negotiations. Specifically, you have asked whether the public should have the ability to discuss the provisions of a contract with a board after an agreement has been reached. In this regard, there is nothing in any law of which I am aware that precludes a public body from permitting discussion of any issue after the issue has been decided. However, I believe that I have mentioned in the past that the Open Meetings Law is silent with respect to public participation. Therefore, although a public body may permit public participation at its meetings, it need not. Under the circumstances, it appears that the school board in which you are interested permits more than is required in terms of public participation.

Further, although your earlier letter made reference to a contractual agreement between the school district and its principals, no reference was made to the means by which the contract was negotiated. In this vein, I would like to point out that §100(1)(e) of the Open Meetings Law permits a public body to enter into executive session to discuss collective bargaining negotiations pursuant to the provisions of Article 14 of the Civil Service Law, which is commonly known as the Taylor Law. Stated differently, a public body may discuss in executive session matters concerning collective

bargaining negotiations with a public employee union. If the principals are not members of a public employee union, §100(1)(e) would not constitute a proper ground for executive session. Further, it appears that such negotiations would deal with principals generally, rather than a specific individual. As such, it appears that the negotiations would be required to be discussed in public.

Your second question concerns "automatic tabling" of issues on agenda, and you have suggested that the Open Meetings Law require that any such item be reconsidered at the next"orthodox regular" meeting. I would only like to state that the Open Meetings Law does not pertain to the subjects that may or may not be discussed by a board, but rather those subjects that must be discussed during an open meeting or that may be discussed in executive session. Consequently, I do not feel that the ability to table an item or a requirement that such an item be reconsidered directly pertains to the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-311

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 28, 1979

Mr. Anthony J. Pieragostini
Village Attorney
Village of Mount Kisco
104 Main Street
Mount Kisco, New York 10549

Dear Mr. Pieragostini:

Thank you for your interest in complying with the Open Meetings Law. Your inquiry concerns the ability to vote during an executive session.

I concur with your contention that public bodies may generally vote during an executive session that is appropriately convened, unless the vote concerns an appropriation of public monies. In such cases, although deliberations might justifiably be conducted during executive session, a public body would be required to reconvene in public to vote to appropriate public monies. It is also noted that action taken in executive session must be recorded in minutes that are required to be compiled and made available within a week of the executive session [see Open Meetings Law, §101(2)].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-312

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 29, 1979

Mr. Marvin J. Jenkins
Building Inspector
Town of Forestburgh
Rte. 1 - Box 56L
Monticello, New York 12701

Dear Mr. Jenkins:

Your letter of March 17 addressed to the Department of Law has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Open Meetings Law.

The question raised regarding the Open Meetings Law concerns the meetings or portions of meetings that are "exempt" from the Law.

There are exemptions from the Law, as well as portions of meetings that may be held in closed or executive session. Specifically, §103 of the Law, a copy of which is attached, essentially states that the Law does not apply to three areas: judicial or quasi-judicial proceedings, political conferences and caucuses, and matters made confidential by federal or state law. In those three instances, a public body need not convene meetings open to the public, provide notice (see §99) or compile minutes (see §101), for example.

In all other cases, a meeting must be convened open to the public. However, after having convened an open meeting, a public body may hold an executive session by following the procedure set forth in §100(1) for the purpose of discussing one or more of the subjects enumerated in §100(1)(a) through (h).

In sum, unless discussion by a public body is exempt from the Law under §103 or appropriate for executive session under §100(1), it must be held during an open meeting.

Your second question concerns your liability as a property owner for the injury or death of persons permitted to hunt or fish on your property. I have spoken with a representative of the Department of Law on your behalf and have been advised that the issue should be discussed with your insurer or an attorney.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Department of Law

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-313

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 29, 1979

Mr. Charles Lawrence
Clerk
Whitney Point Central School
Whitney Point, New York 13862

Dear Mr. Lawrence:

As I indicated in our conversation this morning, your letter addressed to the Education Department has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Open Meetings Law.

Although several questions regarding the Open Meetings Law were raised, you advised in our conversation that the focus of your inquiry is a portion of the collective bargaining agreement between the Whitney Point Central School District and the Whitney Point Teachers Association. Specifically, part C. of Article XII in the provision concerning Level 3 of the grievance procedures states that a hearing conducted at Level 3 shall be held in executive session. The question is whether the hearing must be held in executive session, or whether the Board may conduct the hearing in public.

The Open Meetings Law is permissive. While a public body may enter into executive session in accordance with §100(1) of the Law, there is no requirement that the subject matter appropriate for executive session must be discussed behind closed doors. Nevertheless, I have discussed the matter with a representative of the Governor's Office of Employee Relations and was advised that the ability to waive the requirement that the hearing be conducted in executive session should be determined by an arbitrator if no accommodation can be reached. I was further advised that the provision in question may have been intended to protect the Board or the grievant, or perhaps both. Consequently, the construction of the provision is itself arbitrable and should be decided, in the absence of the ability to reach an accord, by an arbitrator.

For the purpose of responding to your remaining questions, it will be assumed that the Open Meetings Law is applicable in all respects.

First, you inquired as to the ability of a board of education to hear a grievance in executive session. I believe that a grievance could be heard in executive session, for §100(1)(f) of the Law states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of an person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Since the employment history of a specific individual would be considered, an executive session would in my view be proper.

The second question pertains to the ability of a board of education to hear a grievance at a regularly scheduled meeting. As we discussed, I am unaware of any provision of law that would preclude a board from hearing a grievance at a regularly scheduled meeting.

In a similar vein, your fourth question is whether Article IV of the Agreement permits a grievance to be heard at a regular board meeting. As stated earlier, it appears that resolution of this question would be reached most appropriately by an arbitrator.

Lastly, the remaining question is whether Article I of the Agreement requires "an Amendment of Law prior to calling a special Board of Education Meeting for the purpose of holding an executive session." In this regard, I believe that the provisions of the Open Meetings Law govern, unless specific statutory direction to the contrary is provided by the Education Law. As a general matter, public bodies may convene meetings as the need to do so arises. However, every meeting of a public body must be preceded by fulfillment of the notice requirements appearing in §99 of the Open Meetings Law. Additionally, §100(1) requires that a public body convene an open meeting prior to entry into executive session.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-314

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 29, 1979

Dr. Louis A. Salzmann
Superintendent
Kingston City Schools
61 Crown Street
Kingston, New York 12401

Dear Dr. Salzmann:

Your letter addressed to Robert Stone, Counsel to the Education Department, has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Open Meetings Law.

Your first question is whether a board of education may meet in private as long as no official business is conducted by an official vote of the Board of Education. This question was answered by the Court of Appeals in Orange County Publications v. Council of the City of Newburgh (45 NY 2d 947). In the decision, the Court of Appeals affirmed an Appellate Division opinion which held that any convening of a quorum of a public body, on notice, for the purpose of discussing public business is a "meeting" subject to the Open Meetings Law (see 60 AD 2d 409). Further, the court emphasized that the manner in which a gathering is characterized or the absence of an intent to take action is irrelevant, for the entire deliberative process is intended to be open under the Law. Consequently, it is now clear that work sessions, agenda sessions, and the like during which a public body merely discusses, but takes no action, are subject to the Open Meetings Law.

The second question concerns the ability of a board of education or a committee thereof to meet in private sessions to discuss "critical matters" such as personnel, negotiations, and litigation without first convening an open meeting. The subjects that you mentioned are by and large appropriate for discussion in executive session. Nevertheless, the Law defines "executive session" as a portion of an open meeting during which the public may be excluded [see attached, Open Meetings Law, §97(3)]. Moreover, §100(1)

specifies the procedure that must be followed prior to entry into executive session. The cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

As such, an executive session may be held only after the convening of an open meeting.

The response may be different with respect to committees of a school board. In a recent decision, the Appellate Division, Third Department, held that committees created by a school board which have only the power to recommend to the governing body do not take final action, therefore do not "transact public business," and therefore fall outside the definition of "public body" appearing in §97(2) of the Open Meetings Law (Daily Gazette Co., Inc. v. North Colonie Board of Education, 412 NY sup. 2d 494). It is emphasized that the Daily Gazette case is the only Appellate Division decision dealing with the status of committees under the Open Meetings Law and that this Committee strongly disagrees with the decision.

The third question involves whether "executive sessions for discussion purposes only" are permitted. Paragraphs (a) through (h) of §100(1) specify and limit the subjects that may appropriately be discussed in executive session. Therefore, a public body may enter into executive session only after having followed the procedures set forth in §100(1) and identifying one or more of those matters listed as proper for executive session.

And fourth, you have asked whether there is "an obligation to notify the media of each meeting of board members no matter how large or small the number of board members attending that meeting." In this regard, all meetings of public bodies must be preceded by notice given in accordance with the provisions of §99 of the Law. In brief, §99(1), which concerns meetings scheduled at least a week in advance,

requires that notice be given to the public and the news media not less than seventy-two hours prior to the meeting. If the meeting is scheduled less than a week in advance, notice must be given to the public and news media "to the extent practicable" to the public and news media at a reasonable time prior to the meeting [see §99(2)]. However, for the school board to hold a meeting, there must be a quorum present. Since a quorum is defined as a majority of the total membership of a public body (see General Construction Law, §41), a gathering of less than a majority of the total membership of the school board would not be a meeting. Consequently, in such circumstances, notice of the gathering need not be given.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-315

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 30, 1979

Mr. John J. Forken
Steering Committee Co-ordinator
Greater Rochester Common Cause
264 Dunning Avenue
Webster, New York 14580

Dear Mr. Forken:

I have received your letter of March 23, which raises several questions regarding the implementation of the Open Meetings Law by the Board of Education of the Webster Central School District.

Your first question concerns the circumstances surrounding an executive session held by the Board to discuss the closing of an elementary school. Your letter indicates that the executive session was held after the convening of a work session that had not been "publicly announced" and that no clerk was present for the purpose of taking minutes.

As you are aware, the Open Meetings Law permits public bodies to convene executive sessions only to discuss matters enumerated as appropriate for executive session appearing in §100(1)(a) through (h) of the Law. Moreover, the cited provision sets forth a specific procedure for entry into executive session. It appears that the Board followed the procedure for entry into executive session and cited the subject to be discussed as a "personnel matter."

Nevertheless, in my opinion, a discussion concerning the closing of a school does not constitute a "personnel matter."

Section 100(1)(f) of the Open Meetings Law states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

The Committee has consistently advised that the provision quoted above is intended largely to protect privacy, not to shield matters regarding policy under the guise of privacy. For example, §100(1)(f) could in my view be cited appropriately to discuss the termination of a particular employee based upon the performance of duties of that employee. In such a case, the discussion would clearly pertain to a specific individual. However, a discussion by the Board leading to the termination of a department, a program, or the closing of a school, for example, affects personnel indirectly or tangentially and should in my view be discussed during an open meeting, for it deals with policy. Moreover, it is noted that a recent judicial decision held that discussions of personnel layoffs would not fall within the "specific enumerated personnel subjects" set forth in §100(1)(f) of the Open Meetings Law (Orange County Publications v. City of Middletown, Supreme Court, Orange County, December 26, 1978).

Further, the state's highest court held that work sessions and similar gatherings are meetings subject to the Open Meetings Law in all respects, regardless of the manner in which a gathering is characterized or the absence of the intent to take action [Orange County Publications v. Council of the City of Newburgh, 45 NY 2d 947]. As such, work sessions and similar gatherings are meetings that must be preceded by fulfillment of the notice requirements imposed by §99 of the Open Meetings Law. Section 99(1) provides that notice of meetings scheduled at least a week in advance must be given to the public and the news media not less than seventy-two hours prior to the meeting. When meetings are scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting [§99(2)]. Consequently, notice must be given to the public and the news media prior to all meetings, including the work session to which reference was made.

You stated that no clerk was present for the purpose of taking minutes. In this regard, the Open Meetings Law does not require that a particular individual be responsible

for the taking of minutes. In my opinion, any person designated by a public body, including a member of a public body, could take minutes. Therefore, the absence of a specific individual designated to take minutes, such as a clerk, does not in my view constitute a violation of law.

Additionally, although the Open Meetings Law does not define "minutes," §101 of the Law provides minimum requirements for minutes of both open meetings and executive sessions. Subdivision (1) of §101 states that minutes minimally shall consist of "a record or summary of motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Subdivision (2) states that minutes of executive sessions need only consist of a record or summary of action taken, and the date and vote. Consequently, minutes need not include reference to every comment made, but rather must in the case of an open meeting include motions, proposals, resolutions and matters upon which a vote is taken.

Your second question pertains to Board approval of minutes of an executive session on March 12 with respect to its meeting of February 20. You wrote that the minutes in question represented the first minutes of executive session "ever approved" although numerous executive sessions had been held since the effective date of the Open Meetings Law, January 1, 1977.

It is noted that public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

In addition, §87(3)(a) of the Freedom of Information Law (see attached) requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

In view of the foregoing, a school board may deliberate in executive session in accordance with §100(1) of the Open Meetings Law, but it may not in my opinion vote during an executive session, except when the vote pertains to a tenure proceeding. Consequently, if a school board cannot act in executive session, minutes of executive session in the majority of instances need not be compiled.

The third question concerns the absence of minutes or the approval thereof regarding the working session held on February 20. Again, §101 describes the minimum requirements of the contents of minutes. Based upon those requirements, minutes should be compiled regarding all meetings, regardless of the manner in which they are characterized or denominated.

The fourth question pertains to an allegation that the School Board and the Board of Trustees of the Village of Webster had met together to discuss school closings and "the disposition of property owned by the Board within or immediately adjacent to the Village of Webster." Your letter states that "[T]he discussion ranged from sale of property, to rezoning of property, to property transfer between the two bodies..." You also stated that there were no minutes of the gathering in question.

A meeting held by two bodies is in my opinion subject to the Open Meetings Law, for the convening of a quorum of any single board is required to be open and preceded by notice (see Oneonta Star v. Board of Trustees, 412 NYS 2d 927).

Next, as you are aware, §100(1)(h) of the Open Meetings Law states that a public body may enter into executive session to discuss "the proposed acquisition, sale or lease of real property, but only when publicity would substantially affect the value of the property." The focal point of the quoted provision is whether publicity would "substantially affect the value of the property." A response to that question must be determined on a factual, case by case basis. Nevertheless, if for example it is intended that the sale of District property be made to the Town, it appears that publicity would have no effect upon the value of the property. With respect to minutes, it is reiterated that minutes must be compiled in accordance with the provisions of §101 of the Law.

Finally, your letter and the attached materials indicate that there has been a series of problems concerning the Open Meetings Law in your community. Therefore, copies of this opinion will be sent to the School Board and the Village Board of Trustees.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Enc.
cc: School Board
Village Board of Trustees

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-316

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 30, 1979

Mr. Walter Forman
[redacted]

Dear Mr. Forman

I have received your letter of March 26, which concerns the propriety of action taken by the Board of Education of the City of Cohoes under the Open Meetings Law.

According to your letter and the documentation appended to it, the School Board met on February 13 to hold a regularly scheduled monthly meeting. The meeting was adjourned within approximately an hour and a half from its commencement. However, following the adjournment of the meeting, a motion was made to reopen the meeting. Thereafter, the Board voted to go into executive session to discuss "personnel," and during the executive session the Board took action with respect to the approval of a settlement of stipulation regarding a former teacher who had improperly been denied tenure. The approval of the settlement included an appropriation of $12,500 to the subject of the tenure proceeding and $143.50 in court costs.

In my opinion, there were several violations of the Open Meetings Law.

First, as indicated by the minutes, the Board entered into executive session to discuss "personnel matters." In this regard, although some matters concerning personnel may justifiably be held in executive session, others should be discussed during an open meeting. Specifically, §100(1)(f) of the Open Meetings Law permits a public body to enter into executive session to discuss:

> "the medical, financial, credit, or employment history or any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation."

The Committee has consistently advised that the quoted provision is intended to protect personal privacy, not to shield matters of policy under the guise of privacy. Therefore, if the performance of a specific employee is the subject of the discussion, an executive session may appropriately be held. Contrarily, however, if a discussion deals with personnel generally or tangentially, for example, the discussion should in my opinion be open to the public.

Further, it is clear that the subject of the discussion in question, a former teacher, is no longer in the employ of the District. Moreover, the subject matter under discussion apparently did not pertain to the "medical, financial, credit or employment history" of the former teacher, nor did it constitute a matter leading to the "appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal" of the subject of the discussion. Consequently, it appears that the discussion of the approval of the stipulation of settlement should have been discussed during an open meeting.

Although the Open Meetings Law generally permits public bodies to vote during a properly convened executive session, §100(1) of the Law requires that any vote taken to appropriate public monies be conducted during an open meeting. Under the circumstances, if the vote to approve the stipulation and thereby appropriate public monies was taken during an executive session, the Open Meetings Law was violated.

In addition, I believe that the Education Law precludes school boards from voting in executive session, except in conjunction with §3020-a of the Education Law concerning tenure.

As noted earlier, the Open Meetings Law generally permits public bodies to vote during a properly convened executive session, unless public monies are appropriated. Nevertheless, school boards are in my opinion required to vote in public.

Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

In addition, it is noted that §87(3) of the Freedom of Information Law (see attached) requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

Next, your letter and the minutes state that after an executive session held during the regularly scheduled meeting, the Board adjourned the meeting. However, the Board then voted to reopen the meeting, and the stipulation of settlement was approved during executive session held during the second meeting of that evening.

In my opinion, since the Board adjourned the regularly scheduled meeting, it would be reasonable to infer that it had no additional business on the evening of February 13. As such, the reopening constituted the convening of a new meeting. By so doing, the Board failed to comply with the Open Meetings Law with regard to the new meeting by failing to fulfill the notice requirements contained in §99 of the Open Meetings Law.

In sum, first, it is doubtful in my opinion that the discussion of the approval of the stipulation of settlement could justifiably have been held in executive session. Second, the vote to approve the stipulation constituted an appropriation of public monies and therefore should have been taken during an open meeting. Third, the act of re-opening a meeting after having adjourned constituted a new meeting that should have been preceded by compliance with the notice provisions of the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-317

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 3, 1979

John M. Bishop, M.D.
Sag Harbor Elementary School
and Pierson High School
Sag Harbor
Long Island, New York 11963

Dear Dr. Bishop:

I have received your letter of March 29 as well as the materials appended to it.

Having reviewed the materials, there is but one comment that I would like to make. Although page 2 of your letter to the Editor of the East Hampton Star indicates that meetings of the Board are convened as open meetings that are followed by executive sessions, page 3 states that the Board has "found the need for an executive session before each of our regular meetings." In this regard, it is reiterated that "executive session" is defined as a portion of an open meeting during which the public may be excluded [see attached, Open Meetings Law, §97(3)]. Moreover, the procedure for entry into executive session set forth in §100(1) of the Open Meetings Law clearly requires that a motion be made during an open meeting in order to enter into executive session. Consequently, it is reiterated that an open meeting must be convened prior to entry into executive session.

Other than this single point of confusion, which may be mine, I have no disagreement with your thoughtful letter to the Editor.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

cc: Helen Rattray

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-318

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 4, 1979

Mr. David R. Battaglia
Concerned Taxpayers League
232 Willowbend Road
Tonawanda, New York 14150

Dear Mr. Battaglia:

I have received your letter of March 29 in which several questions have been raised regarding the implementation of the Open Meetings Law by the Board of Education of the City of Tonawanda.

First, you stated that the Board has requested an executive session "after every meeting." In this regard, "executive session" is defined as a portion of an open meeting during which the public may be excluded [see attached Open Meetings Law, §97(3)]. As such, it is clear that an executive session is not separate and distinct from a meeting, but rather is a portion thereof. Therefore, although an executive session may be held at the end of an open meeting, it cannot in my view be held after a meeting.

This contention is bolstered by the provisions of §100(1) of the Open Meetings Law, which set forth the procedure for entry into executive session. Specifically, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

The quoted provision makes clear that a vote to enter into executive session must be taken during an open meeting, preceded by a majority vote of the total membership of the public body, and identify in general fashion the subjects

intended to be discussed during executive session. Further, paragraphs (a) through (h) of §100(1) limit and specify the areas appropriate for discussion in executive session. Consequently, unless a public body seeks to discuss one or more of the subjects enumerated as appropriate for executive session in §100(1)(a) through (h) of the Law, it must conduct its deliberations during an open meeting.

Your second area of inquiry concerns a lack of minutes of executive sessions. In addition, you have contended that minutes must be taken whenever a quorum is present.

As a general matter, minutes of executive sessions must be compiled only when action is taken during an executive session [see §101(2)]. Further, public bodies may generally vote during executive sessions, except when the vote concerns an appropriation of public monies. When public monies are appropriated, votes must always be taken during open meetings.

However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District

#1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

In addition, §87(3)(a) of the Freedom of Information Law (see attached) requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

In view of the foregoing, a school board may deliberate in executive session in accordance with §100(1) of the Open Meetings Law, but it may not in my opinion vote during an executive session, except when the vote pertains to a tenure proceeding. Consequently, if a school board cannot act in executive session, minutes of executive session in the majority of instances need not be compiled.

Finally, the beginning of your letter indicates your belief that the Committee investigates governing bodies that may not be in compliance with the Freedom of Information Law and the Open Meetings Law. Although I attempt to "investigate" to the extent possible, the Committee is not an investigative body. The central function of the Committee involves providing advice by means of legal opinions to any person having questions arising under the Open Meetings Law or the Freedom of Information Law. While the opinions are not binding, they have been cited in many instances as the basis for judicial determinations.

Enclosed for your consideration are copies of the Committee's report to the Legislature on the Open Meetings Law and a pamphlet entitled "The New Freedom of Information Law and How to Use It."

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-319

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 6, 1979

Richard K. Bernard, Esq.
Assistant Secretary and
First Assistant Counsel
Metropolitan Transportation
Authority
1700 Broadway
New York, New York 10019

Dear Mr. Bernard:

Thank you for your thoughtful letter regarding the Committee's third annual report to the Legislature on the Open Meetings Law.

Your letter raises two points, one pertaining to quorum requirements, and the other to the status of committees.

I realize that in many instances authorities may act by means of statutory quorum requirements that differ from those appearing in §41 of the General Construction Law. In such cases, it has been advised that specific quorum requirements contained in a "special statute," such as §1263(3) of the Public Authorities Law, supersedes a statute of general application, such as the Open Meetings Law. Please note that an opinion on the subject (see attached) rendered at the request of another authority advised that the authority could act by means of a majority of directors "then in office" under §6254(10) of the Unconsolidated Laws, which is analogous to the quorum provision under which the MTA operates. Even if the Committee's proposal is enacted into law, I believe that I would continue to advise that "special" statutory requirements supersede those found in the Open Meetings Law, a statute of general application.

With respect to your second contention, that committees and subcommittees should not be considered public bodies subject to the Open Meetings Law, I respectfully

disagree on the basis of both philosophy and the intent of the Legislature. As stated in the report, although committees may have only the authority to recommend, their recommendations may often be rubber-stamped by a governing body. Consequently, if committees are outside the scope of the Open Meetings Law, the deliberative process may effectively be closed. Moreover, although you stated that recommendations might be made available to the public prior to arriving at a final decision, it appears that recommendations made by advisory bodies are deniable under the Freedom of Information Law [see McAulay v. Board of Education, City of New York, 61 AD 2d 1048 (1978)]. Therefore, under the current state of case law, recommendations made by committees or other governing bodies need not be made available to the public.

Further, in the debate in the Assembly that preceded passage of the Open Meetings Law, the sponsor made clear upon questioning that he intended that the definition of "public body" include "committees, subcommittees, and other sub-groups." The Committee's advice regarding the status of committees and similar bodies has been based to a great extent upon the clear statement of legislative intent voiced by the sponsor prior to the passage of the Open Meetings Law.

Once again, I thank you for your comments and appreciate your concerns. If you would like to discuss the matter further, I am at your service.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-320

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 6, 1979

Ms. Ethel Haslun
Clerk
Board of Supervisors of
Schoharie County
Office of Clerk
Schoharie, New York 12157

Dear Ms. Haslun:

Thank you for your letter of April 5. It is noted at the outset that although your letter cites the Freedom of Information Law, your questions apparently deal with the interpretation of the Open Meetings Law.

Your question is whether it is "permissable (sic) to exclude public or press from attending a committee meeting or an executive session of the Board of Supervisors when there can be no decisions made or no actions taken, but it must be acted upon by the full Board in a regular public session." The inquiry pertains to several aspects of the Open Meetings Law, and I will deal with each of them.

First, it is noted that the Open Meetings Law does not distinguish between rights of access to meetings by the public and the news media. If a member of the public may attend the meeting, a member of the news media may attend, and vice versa.

Second, while the phrase "executive session" has been in existence for years, it was never defined until the enactment of the Open Meetings Law in 1977. Section 97(3) of the Law defines "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, the procedure for entry into executive session, which is set forth in §100(1) of the Law, indicates that a motion to enter into executive session must be made during an open meeting, carried by a majority vote of the total membership of the public body, and identify

generally the subjects intended to be discussed behind closed doors. Further, the subject matter that is appropriate for executive session is specified and limited in paragraphs (a) through (h) of §100(1) of the Law. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof during which the public and news media may be excluded.

Moreover, despite the vagueness of the definition of "meeting" appearing in §97(1) of the Law, the state's highest court has interpreted the definition expansively. In brief, the Court of Appeals affirmed the notion that any convening of a quorum of a public body, on notice, for the purpose of discussing public business is a "meeting" open to the public. The decision made clear that such a gathering is subject to the Open Meetings Law even if there is no intent to take action, but merely an intent to discuss, and regardless of the means by which such a gathering is characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947].

The second area of inquiry concerns the ability to exclude the public and the news media from committee meetings. It is noted in this regard that the Appellate Division, Third Department, recently held that committees are not public bodies. Its rationale is based upon the argument that committees cannot take final action, therefore do not "transact public business," and consequently fall outside the definition of "public body" [see §97(2) and Daily Gazette v. North Colonie Board of Education, 412 NYS 2d 494]. I would like to emphasize that I believe that the decision is contrary to the advice that had been consistently given by the Committee, as well as other judicial opinions. The decision has been appealed and, in addition, I am hopeful that the Legislature will amend the Open Meetings Law this session to ensure that committees, subcommittees, and similar bodies will clearly be subject to the Law in all respects.

Enclosed are copies of the Open Meetings Law and the Committee's most recent report to the Legislature on the subject.

I hope that I have been of some assitance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-321

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 9, 1979

Mr. John J. Forken
Steering Committee Co-ordinator
Greater Rochester Common Cause
264 Dunning Avenue
Webster, New York 14580

Dear Mr. Forken:

As promised on April 6th, I have made several inquiries on your behalf regarding the questions raised in your letter of March 24. In brief, your letter indicates that the Board of Education of the Penfield Central School District met in executive session to discuss the participation of an eighth grade student on the high school varsity swimming team. Your letter, as well as the materials appended to it, indicate that neither the student seeking participation on the varsity team nor her parents was given a substantial opportunity to be heard or present their "case" before the School Board.

In my opinion, there is no clear response that can be given, for there is little if any written direction in the nature of case law, regulations, or determinations of the Commissioner of Education that have a direct bearing on the situation that you presented.

It appears, however, that the Board of Education may have used improper terminology or perhaps the wrong vehicle for discussion of the issue.

Although the phrase "executive session" has been in existence for many years, it was never specifically defined until the Open Meetings Law became effective in 1977. Section 97(3) of the Law defines "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law sets forth a procedure for entry into executive session and specifies and limits the subject matter that may be discussed during an executive session.

Under the circumstances, although the Board of Education could in my view have properly discussed the matter behind closed doors, the discussion should likely have been discussed outside the scope of the Open Meetings Law.

Before discussing legal distinctions between executive sessions and matters exempt from the Law, I want to emphasize that the Board apparently erred only with respect to the terminology used regarding the discussion of the issue behind closed doors.

A public body may engage in discussion behind closed doors in two instances. The first concerns matters deemed appropriate for discussion in executive session that are enumerated in §100(1) of the Law. The second pertains to matters that are exempt from the Open Meetings Law under §103. Stated differently, if a public body engages in the discussion of a matter that is "exempt" from the Open Meetings Law, the provisions of the Open Meetings Law are not applicable. To discuss a matter that is exempt, a public body need not provide notice, move to discuss an exempt issue behind closed doors, or compile minutes, for example.

Relevant to the situation is §103(3), which states that the Open Meetings Law does not apply to "any matter made confidential by federal or state law." In this regard, the federal Family Educational Rights and Privacy Act (commonly known as the "Buckley Amendment") provides in a nutshell that records identifiable to a particular student under the age of 18 are confidential with respect to all but the parents of the student. Consequently, any records or discussion thereof pertaining to a specific student would be confidential under federal law. Therefore, the discussion of participation of an eighth grade student on the varsity swimming team would in my view be a matter made confidential by federal law and as such would be outside the scope of the Open Meetings Law.

In sum, while the Board characterized its private discussion as an "executive session," it appears that the discussion technically was not an executive session, but rather was exempt from the Open Meetings Law and therefore conducted behind closed doors.

In terms of a possible remedy and due process, there is little that can be advised. In situations in which student rights to an education have been suspended, the Commissioner of Education has determined that the student has a right to due process and an opportunity to be heard. In this case,

however, it does not appear that an eighth grade student has a "right" to participate in varsity athletics. As such, it is unclear at best whether the student or her parents have the "right" to a due process hearing or the equivalent thereof.

Further, it appears that the only question that can be raised is whether the determination of the Board was reasonable in view of the facts. In this regard, the subject of the controversy may seek review of the Board's decision by means of a review by the Commissioner of Education. At this juncture, I believe that a review by the Commissioner of Education is the only recourse available to the student and her parents.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: Lee E. Burgess

School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-322

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 10, 1979

Joe Schapiro, Esq.
[redacted]

Dear Mr. Schapiro:

Your letter addressed to Robert D. Stone, Counsel to the Education Department, has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Open Meetings Law (see attached).

Several problems have been described in your letter, and I will attempt to address each of them.

As a general matter, the deliberations of a public body, such as a school board, must be conducted in full view of the public. A public body may enter into executive session only after having followed the procedure set forth in §100(1) of the Open Meetings Law. Further, the areas of discussion appropriate for executive session are specified and limited in paragraphs (a) through (h) of §100(1).

It is also noted that the Court of Appeals has affirmed an expansive interpretation of the Open Meetings Law concerning the scope of the definition of "meeting" [§97(1)] and the intent of the Law generally (see Orange County Publications v. Council of the City of Newburgh, 60 AD 2nd 409, aff'd 45 NY 2d 947).

Although you stressed that the Board voted in public with respect to a particular issue following closed session, the Court in Orange County made clear that the entire deliberative process is intended to be open:

> "[W]e believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document.

> Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (id. at 415).

Nevertheless, there may be situations in which portions of a discussion involving the budget may in my view be held in executive session. For example, if collective bargaining negotiations are ongoing, and a discussion of the budget cannot be separated from a discussion of the negotiations, an executive session may be held to that extent pursuant to §100(1)(e).

In addition, §100(1)(f) permits a public body to enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

The Committee has consistently advised that the quoted provision is intended to protect personal privacy, not to shield matters regarding policy under the guise of privacy. Therefore, a public body may convene an executive session to discuss the employment history of a particular individual, for example. In such a discussion, the board would consider the strong or weak points of an individual to determine whether he or she should be retained. Such deliberations would clearly bear upon the privacy of the subject of the discussion.

On the other hand, however, if the discussion dealt with the funding of a particular position, I believe that the discussion should be held during an open meeting, for it would involve policy, rather than the performance of a particular individual. Moreover, in a situation in which a county legislature discussed the removal of a group of employees for budgetary reasons, it was held that an executive session could not have appropriately been held (Orange County Publications v. County of Orange, Supreme Court, Orange County, December 26, 1978).

You mentioned that private discussion may be necessary in some instances, "because of the fear of antagonizing certain individuals." In this regard, historically public bodies were created in order to obtain the views of several, which may be disparate or conflicting, in order to reach a better decision than a single individual could make alone. From my perspective, it is this give and take, the deliberative process, that is central to the Open Meetings Law. It is the only means by which the public can measure the performance of its elected officials.

Lastly, your letter indicates that at a meeting attended by some 500 persons "[E]very person was given an opportunity to express themselves." It is emphasized that the Open Meetings Law is silent with respect to public participation. Although the public has the right to "attend and listen to the deliberations and decisions that go into the making of public policy" (see §95), the Law envisions no right to participate. As such, a public body may develop reasonable rules to permit public participation, but it need not.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: Judith Hecker, Esq.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1100
OML-AO- 323

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 12, 1979

Mr. Paul A. Palmgren
[redacted]

Dear Mr. Palmgren:

As you requested in your most recent letter, I have referred to your letter of March 14 and my response of March 19.

Your first question concerns the ability of the public to be aware of the provisions that are the result of collective bargaining negotiations that have been all but settled. Stated differently, you have asked whether the public has the ability to learn of the terms and conditions of a collective bargaining agreement prior to its ratification. The inquiry arises under the Freedom of Information Law, and I believe that such records should be made available. As you are aware, the Freedom of Information Law provides access to all records in possession of an agency, except records or portions thereof that fall within one or more categories of deniable information enumerated in §87(2)(a) through (h) of the Law. Relevant to your inquiry is §87(2)(c), which states that an agency may withhold records or portions of records which if disclosed would "impair present or imminent contract awards or collective bargaining negotiations." If an agreement has been reached and all that remains is ratification, disclosure of the terms of the agreement would not in my opinion at that point "impair" the negotiations. Consequently, the agreement at that stage should in my view be made available.

Your second question described the relationship between the Jamestown Board of Education and the Jamestown Principals' Association. Based upon your letter, it appears that the Association does indeed participate in collective bargaining negotiations. Therefore, discussions involving the negotiations could likely be held in executive session under §100(1)(e) of the Open Meetings Law.

Your final question concerns the language of the Open Meetings Law insofar as it pertains to the ability to enter into executive session. The Law states that a public body may enter into executive session:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys" (emphasis added).

I regret that I cannot provide a clear and concise interpretation of the meaning of "general." Nevertheless, I do not believe that "personnel matters" without more can be cited as a basis for entry into executive session. Section 100(1)(f) of the Open Meetings Law states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

The word "personnel" does not appear in the quoted provision. Further, the Committee has consistently advised that §100 (1)(f) is intended largely to protect privacy, not to shield policy under the guise of privacy. Therefore, a public body could hold an executive session to discuss the employment history of a particular individual, for example. However, a discussion of budget cuts or the elimination of positions should in my opinion be discussed during an open meeting, for such a discussion would concern policy. This stance has been confirmed by a recent judicial decision (see Orange County Publications v. County of Orange, Supreme Court, Orange County, December 6, 1978).

In view of the foregoing, although a public body need not identify the specific individual or individuals who may be the subject of an executive session, a public body must state the "general" area of inquiry, such as the "matters leading to the employment of a particular individual," or "the financial history of a particular corporation," for instance.

Further, your letter appears to indicate that the Jamestown Board of Education schedules executive sessions in advance of a meeting. In my opinion, a public body can never schedule an executive session in advance. As noted earlier, §100(1) of the Open Meetings Law requires that a vote be taken during an open meeting that is passed by a majority of the total membership of a public body prior to entry into executive session. Therefore, a public body can never know in advance that there will be a sufficient number of votes to enter into executive session until an open meeting has been convened. Members of a public body may be ill or may vote against entry into executive session. Consequently, to reiterate, a public body cannot schedule an executive session in advance of convening an open meeting.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 324

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 16, 1979

John M. Bishop, M.D.
Sag Harbor Union Free
School District
Hampton Street
Sag Harbor
Long Island, New York 11963

Dear Dr. Bishop:

I want to thank you once again for your cooperation and your interest in complying with the Open Meetings Law.

You have asked that I review the legal notice published by the District, a copy of which was sent to me with your letter of March 29. In relevant part, the legal notice states that "[M]eeting convenes at 7:30 P.M. for Executive Session and will open to the public at 8:15 P.M."

In my opinion, the notice insofar as it pertains to executive sessions is inappropriate. Specifically, "executive session" is defined as a portion of an open meeting during which the public may be excluded [§97(3)]. Further, §100(1) of the Law sets forth the procedure for entry into executive sessions and states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys."

In view of the foregoing, it is clear that a public body may enter into executive session only after having convened an open meeting and only after identifying the subject matter intended to be discussed in a motion passed by a

majority of its total membership. As such, for a variety of reasons, public bodies cannot technically schedule an executive session in advance. For example, the subject matter to be discussed may not be appropriate for executive session; members of a board might vote against entry into executive session; or members may be absent from a meeting, and a board might not have the requisite number of votes to enter into executive session.

I would suggest that the sentence in the notice concerning executive session be deleted. You might want to state in the alternative that executive sessions held pursuant to Public Officers Law, §100, are generally held at the beginning of meetings.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-325

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 17, 1979

Ms. Gretchen Zeh
Saratoga County Economic
Opportunity Council
510 North Broadway
Saratoga Springs, New York 12866

Dear Ms. Zeh:

I have received your letter concerning a hearing held by the Investigative Committee of the Saratoga County Economic Opportunity Council. Your questions pertain to the application of the Open Meetings Law to not-for-profit community action agencies, whether the chair must recognize visitors during meetings and which personnel issues may be considered during executive session.

As I explained during our conversation, the Open Meetings Law does not in my opinion apply to the Economic Opportunity Council, for the Law is applicable only to public bodies operating within or under the control of government. While there may be a nexus between the Council and government in terms of duties and finances, the Council, a not-for-profit corporation, is in my view outside the scope of the Open Meetings Law. Consequently, while any group, public or otherwise, may hold meetings open to the public, only a "public body" subject to the Open Meetings Law must comply with the provisions of that statute.

In the same vein, the procedures regarding the recognition of visitors at meetings or the nature of personnel matters that may be considered in executive session are determined by procedures developed by the Council. Again, since the Council is not subject to the Open Meetings Law it presumably operates pursuant to its own rules, by-laws or applicable provisions of the Not-for-Profit Corporation Law.

In order to respond to your questions regarding the recognition of visitors and personnel issues, it will be assumed for the purpose of illustration that the Council is subject to the Open Meetings Law.

The Open Meetings Law provides that the public may "attend and listen" to the deliberations of a public body. There is no requirement in the Law that members of the public be given an opportunity to participate or otherwise express their opinions. If a public body seeks to permit public participation, it may do so by means of the adoption of reasonable rules. Nevertheless, it need not permit public participation.

In terms of personnel matters, §100(1)(f) of the Open Meetings Law states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

In the opinion of the Committee, the quoted provision is intended to protect personal privacy, not to shield matters regarding policy under the guise of privacy. Therefore, if a board is discussing the employment history of a particular individual to determine whether he or she should be retained, such a discussion could justifiably be held in executive session. However, if the same board discusses the elimination of a position due to budgetary considerations, the discussion would pertain to policy and should be discussed in public.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-326

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 19, 1979

Mr. Paul A. Palmgren
[redacted]

Dear Mr. Palmgren:

I have received your letter of April 17. Your inquiry concerns the ability of a school board to enter into executive session to discuss collective bargaining negotiations.

Although my letter of April 12 discussed quite fully the ability of a board to enter into executive session to discuss "personnel matters," less attention was given to the ability to discuss collective bargaining negotiations in executive session, for the Open Meetings Law in my opinion is relatively clear on the matter. I do not believe that §100(1)(e) is subject to conflicting interpretations to the same extent as §100(1)(f).

Section 100(1)(e) of the Law states that a public body may enter into executive session to discuss "collective negotiations pursuant to Article 14 of the Civil Service Law." As explained previously, Article 14 is commonly known as the "Taylor Law" and pertains to the relationship between government and public employee unions.

In my view any discussions held by a public body that involve collective bargaining negotiations under the Taylor Law may be held in executive session. Although a board may discuss policy in conjunction with collective bargaining negotiations, that aspect of a discussion does not in my opinion remove the discussion from the realm of an executive session. To reiterate, I believe that a public body may discuss in executive session matters that concern collective bargaining negotiations, even if the board itself does not negotiate but rather discusses information provided by staff in conjuntion with negotiations.

Your next question involves the nature of a "minimum general statement" cited by a board in its motion to go into executive session. My opinion here must be similar to that offered in my earlier letter. While the Law states that a public body must generally identify the subject matter to be discussed in executive session, what is "general" is open to question. One one hand, I tend to doubt that a court would require that a public body identify the particular public employee union that is the subject of discussion in executive session. On the other hand, it is difficult to imagine why a public body would be recalcitrant to identify the public employee union that is the subject of negotiations. In short, I have no precise answer that I can give you.

It is noted that your letter refers to unions that might be identified "as the ulterior purpose of the executive session." In my opinion, executive sessions that are properly convened are completely legal and could hardly be characterized as "ulterior."

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jamestown Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-327

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 20, 1979

Mr. Mickey Mayes
[redacted]

Dear Mr. Mayes:

I have received your letter of April 18 concerning a situation in which the members of the Town Board of the Town of Warrensburg refused to let the public "have an opportunity to speak or ask questions" during or after its meeting. Further, your letter indicates that the Town Supervisor, Mr. Charles Hastings, stated that the gathering was a "public meeting," not a hearing, and that "he did not have to let the public speak."

In my opinion, Supervisor Hastings' assertion is correct.

The Open Meetings Law permits the public to "attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §95). The Law is silent with respect to public participation. Consequently, it is my view that a public body need not permit public participation during or after a meeting.

There is nothing in the Open Meetings Law that prohibits a public body from permitting public participation. Nevertheless, it is clear that the Open Meetings Law confers no right upon the public to speak. Further, while a public body may adopt reasonable rules to govern its own proceedings, including rules regarding the ability of the public to speak, there is no requirement that such rules regarding public participation be adopted.

In sum, the Open Meetings Law merely provides the public with the right to attend and listen to the deliberations of public bodies; it does not create a right on the part of the public to participate.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Supervisor Hastings

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-328

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 23, 1979

The Town Board
Town of Ellington
Ellington, New York 14732

Dear Members of the Board:

This office has received a letter containing allegations of violations of the Open Meetings Law. As a matter of course, I respond to inquiries from individuals and send copies to the units of government that are the subjects of inquiries. Nevertheless, in this case, the letter was signed "Concerned Citizens of the Township of Ellington, N.Y."; neither a name nor an address was provided for the purpose of transmitting a response. I feel, however, that a response should be given and transmitted to you.

The following consists of a brief overview of the Open Meetings Law.

First, the Law applies to public bodies. "Public body" is a phrase that is defined in §97(2) of the Law (see attached). The definition includes entities such as the town board, a planning board, a zoning board of appeals, a board of fire commissioners, and the like.

Second, public bodies must hold their meetings open to the public pursuant to the definition of "meeting" [see §97(1)]. Although the definition is somewhat vague, the state's highest court held that any convening of a quorum of a public body, on notice to the members, for the purpose of discussing public business is a meeting subject to the Law in all respects (see Orange County Publications v. Newburgh, 45 NY 2d 947). Therefore, work sessions, agenda sessions and similar gatherings must be open to the public, whether or not there is an intent to take action.

Third, executive or closed sessions may be held only after convening an open meeting and following the procedure set forth in §100(1) of the Law. Further, the subject matter for discussion in executive session is specified and limited by the categories of discussion listed as appropriate for executive session listed in paragraphs (a) through (h) of §100(1) of the Law.

Fourth, a public body may vote during an appropriately convened executive session, as long as the vote does not pertain to the appropriation of public monies. As such, any vote taken by a public body to appropriate public monies must be taken during an open meeting.

Fifth, every meeting must be preceded by notice given pursuant to §99. In brief, if a meeting is scheduled at least a week in advance, notice must be given to the public and the news media (at least two) not less than seventy-two hours prior to a meeting. If a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting.

The requirements concerning the taking of minutes are described in §101 of the Law.

To provide you with an overview of the operation of the Law, problems that have arisen under the Law and recommendations for its improvement, I have enclosed a copy of the Committee's third annual report to the Legislature on the subject.

Should any questions arise regarding the interpretation of the Open Meetings Law, please feel free to contact me. I will be happy to provide assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-329

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 23, 1979

Mr. Donald Caldwell
Music Editor
Village Times
12 Cinderella Lane
East Setauket, New York 11733

Dear Mr. Caldwell:

I have received your letter of April 18 concerning the application of the Open Meetings Law to the New York State Council on the Arts.

In my opinion, the Council on the Arts is clearly subject to the Open Meetings Law.

Relevant to your inquiry, §97(2) defines "public body" to include:

> "any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

The Council is an entity consisting of more than two members, it may transact public business only by means of a quorum (see General Construction Law, §41), and it performs a governmental function for the state. As such, it is subject to the Open Meetings Law in all respects.

To provide you with greater information concerning the Law and its interpretation, I have enclosed a copy of the statute as well as the Committee's third annual report to the Legislature on the subject. By means of a review of the report, you can become familiar with the judicial

interpretations of the Law, problems that have arisen under the Law, and recommendations for its improvement.

Your letter makes reference to "secret meetings" that may have been held "between the Arts Council representatives and members of the board of two existing symphony orchestras." In this regard, it is important to emphasize that meetings between staff representatives, for example, and the members of the symphony boards would not constitute meetings under the Law. Since staff itself does not constitute a public body, gatherings of staff with others would not be meetings under the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-330

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 7, 1979

Ms. Chris Liuzzo
[redacted]

Dear Ms. Liuzzo:

I have received your letter of April 30 regarding community services boards created by Article 41 of the Mental Hygiene Law. Specifically, you have asked whether meetings of such boards must be open to the public and, if so, under what conditions may the meetings be closed.

In my opinion, a community services board is a "public body" subject to the New York Open Meetings Law in all respects (see attached, Open Meetings Law, Public Officers Law, §§95-106).

The Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..."[§97(2)].

By separating the quoted definition into its elements, one can conclude that a community services board is a public body subject to the Law.

First, the boards in question consist of fifteen members (see Mental Hygiene Law, §41.11) that are required to act by means of a quorum. Although there may be neither a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board of similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exericse such...duty."

Therefore, although the boards may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum.

Second, it is clear that community services boards "transact public business." It is noted that I discussed the powers and duties of community services boards with representatives of the Department of Mental Hygiene and was informed that community services boards perform either policy-making or advisory functions, depending upon the nature of the local law enacted in the county in which they operate. In the case of Schenectady County, the community services board is a policy-making group that undoubtedly "transacts" public business.

Third, public business is transacted by the boards for both the state and a public corporation, a county.

In view of the foregoing, I believe that community services boards are subject to the Open Meetings Law.

With respect to executive sessions, §97(3) of the Open Meetings Law defines "executive session" as that portion of a meeting during which the public may be excluded. Further, §100(1) describes the procedure that must be followed prior to entry into executive session. Specifically, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Moreover, the subjects that may be discussed behind closed doors are limited to the eight categories of discussion that are listed in paragraphs (a) through (h) of §100(1). I have enclosed a copy of the Open Meetings Law for your consideration and review.

Finally, §103 of the Law describes three exemptions. Stated differently, the Open Meetings Law does not apply to three areas of discussion. The only exemption which in my view might arise in the course of discussion by a community services board is §103(3), which deals with matters "made confidential by federal or state law". Since records pertaining to patients in Mental Hygiene facilities are confidential, discussions regarding specific patients would be outside the scope of the Open Meetings Law. However, discussions concerning patients generally should in my view be discussed in public.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

Encs.

cc: Barbara Schliff

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-331

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 8, 1979

Mr. John P. Reardon, Jr.
[redacted]

Dear Mr. Reardon:

Thank you for your interest in compliance with the Open Meetings Law. Your inquiry pertains to the propriety of an executive session held by the West Sand Lake Town Board.

According to your letter, a heated exchange occurred during a public hearing held to discuss the possibility of moving the Town Clerk's office from a private home to a new room to be built onto the Town Hall, as well as changes in the hours of operation of the Clerk's office. Following the hearing, a meeting was held by the Board. When the issues regarding the Clerk's office arose, a motion to enter into executive session was made, seconded and carried. The question raised concerns the legality of the executive session.

In my opinion, the Board failed to follow the procedure required for entry into executive session. In addition, it appears unlikely that the subject matter discussed was appropriate for executive session. A public body must follow the procedure set forth in §100(1) of the Law in order to enter into executive session. Specifically, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a public body may enter into executive session only by means of a motion carried by a majority of its total membership that identifies the general areas of intended discussion. If the motion for entry into executive session did not identify the area or areas sought to be discussed, the Open Meetings Law was violated.

Among the subjects listed in the Law appropriate for executive session, most relevant to your inquiry is §100(1)(f), which states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal or any person or corporation..."

The Committee has consistently advised that the quoted provision is intended to protect privacy, rather than shield discussions regarding policy under the guise of privacy.

For example, if the discussion dealt with the adequacy of the performance of duties of the Town Clerk, such a discussion would bear upon the Clerk's privacy and, therefore, could justifiably be held behind closed doors. If, on the other hand, the issues discussed concerned the adequacy of the space now being used, the cost of constructing a new facility, the hours during which the Clerk now operates or the workload of the Clerk, for example, questions of policy, not privacy, were of foremost consideration. Consequently, those issues, if discussed, should have been aired during an open meeting. Further, since a particular proposed public law was the focal point of the executive session, it appears that the discussion pertained to a legislative matter, the future policy of the Town, rather than a "personnel" matter.

Although your letter indicated that you were informed that "personalities" were discussed, that alone does not in my view justify an executive session. To reiterate, only the areas specified in the Law may be discussed in executive session.

Lastly, you asked whom you "should notify" with respect to any possible violation of the Open Meetings Law. In this regard, the Committee has no authority to enforce compliance with the Open Meetings Law. On the contrary, the Committee merely has the capacity to advise. Consequently, a copy of my response to you will be sent to the West Sand Lake Town Board. Perhaps its contents will serve to educate the members of the Board and thereby avoid future violations of the Open Meetings Law. Further, I believe that the advice of the Committee is heeded in most instances, for the courts have recently cited several of the Committee's opinions as the basis for their own.

Should you determine to challenge a violation of the Open Meetings Law in court, a court could in its discretion make null and void action taken by a public body in violation of the Open Meetings Law. In addition, a court could award reasonable attorneys fees to the party that prevails.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert T. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: West Sand Lake Town Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1127
OML-AO-332

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 8, 1979

Mr. Gene Russianoff
Project Coordinator
New York Public Interest
Research Group, Inc.
5 Beekman Street
New York, New York 10038

Dear Mr. Russianoff:

I have received your letter of May 3 and thank you for your interest in compliance with the Open Meetings Law. Appended to your letter is correspondence with Haskell Ward, Chairperson of the New York City Health and Hospitals Corporation, in which several alleged violations of the Open Meetings Law were brought to Mr. Ward's attention. For the purpose of my response, it will be assumed that your allegations are accurate.

First, you have stated that the Board of Directors of the Health and Hospitals Corporation has held a series of "informal" sessions during which the public has been excluded. In fact, the exclusion of members of the public from the sessions in question was not due to lack of knowledge of the sessions, but rather to specific refusals to permit entry on the part of those who sought to attend.

In this regard, the focal point of the Open Meetings Law is the definition of "meeting" [see attached, §97(1)]. Despite the vagueness of the definition, the Court of Appeals has affirmed an Appellate Division decision which held that any convening of a quorum of a public body for the purpose of discussing or carrying on public business is a "meeting" subject to the Open Meetings Law in all respects (Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947). It is emphasized that the opinion rendered by the Appellate Division dealt specifically with the status of "work sessions" and other "informal gatherings":

> "[W]e believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (id. at 415).

The court further stated that:

> "[W]e agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to a point just short of ceremonial acceptance'..." (id. at 416).

As such, it is clear that the entire decision-making process is subject to the Open Meetings Law and not merely the situation in which action is taken or in which there is an intent to take action.

In addition, it is equally clear that the Board is a "public body" as defined in §97(2) of the Law. The Board is an entity consisting of more than two members that is required to act by means of a quorum (see General Construction Law, §41), and that performs a governmental function for a public corporation as defined in §66 in the General Construction Law. The definition of "public corporation" includes "public benefit corporation" [see General Construction Law, §66(1)].

Your letter to Chairperson Ward also indicates that no notice was given prior to the sessions in question. In this regard, §99(1) of the Law requires that meetings scheduled at least a week in advance must be preceded by notice given to the public and the news media not less than seventy-two hours prior to the meeting. Section 99 (2) states that a meeting scheduled less than a week in advance must be preceded by notice given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Consequently, all meetings must be preceded by notice to the public and news media, whether regularly scheduled or otherwise.

Lastly, in your letter to Chairperson Ward, you requested minutes or a transcript of the informal session held by the Board on April 24. In conjunction with that request, I direct your attention to the provisions of the Freedom of Information Law (see enclosed).

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as the Health and Hospitals Corporation, are available, except to the extent that records or portions thereof fall within one or more categories of deniable information listed in §87(2)(a) through (h) of the Law.

In addition, "record" is defined in §86(4) to include "any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." Therefore, notwithstanding the status of the gathering held on April 24, materials created in the nature of minutes or a transcript relative to the gathering constitute "records" subject to rights of access granted by the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Haskell Ward

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-333

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 10, 1979

Ms. Sheila Zive
[redacted]

Dear Ms. Zive:

Your letter addressed to the Department of Audit and Control has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Open Meetings Law.

According to your letter, the Nominating Committee of Dobbs Ferry conducts virtually all of its business during executive sessions. Your question is whether the Committee can legally convene its meetings in executive session, or whether the procedure for entry into executive session set forth in §100(1) of the Open Meetings Law must be followed.

It is emphasized at the outset that I agree with your contention as well as that provided by Lester Lichter, Village Attorney for the Village of Dobbs Ferry, that committees, such as the Village Nominating Committee, are public bodies subject to the Open Meetings Law in all respects.

Nevertheless, in good faith I am compelled to advise you that the only appellate court decision rendered to date pertaining to the status of committees and subcommittees held that such entities are outside the scope of the Open Meetings Law [Daily Gazette Co., Inc. v. North Colonie Board of Education, 412 NYS 2d 494 (1979)]. In brief, the court held that committees and subcommittees that have only the authority to advise or recommend do not "transact public business" under the definition of "public body", [see §97(2)], therefore are not public bodies, and consequently fall outside the scope of the Open Meetings Law.

In my view, the decision is wrong. A transcript of the debate in the Assembly that preceded passage of the Open Meetings Law indicates clearly that the sponsor intended that the definition "public body" be construed to include "committees, subcommittees, and other subgroups" (transcript of Assembly debate May 20, 1976, pp. 6262 to 6270).

To remedy the situation, this Committee has recommended that the Legislature amend the Law in order that the definition of "public body" clearly includes committees, subcommittees, and similar groups. In fact, I believe that legislation on the subject will be introduced shortly.

Notwithstanding the foregoing and assuming that the Nominating Committee is a public body, it would be required to convene an open meeting, pass a motion during the open meeting by a majority vote of its total membership that identifies in general fashion the subject or subjects intended to be discussed behind closed doors. Furthermore, the subject matter that may be appropriately discussed in executive session is limited by the Law [see §100(1)(a) through (h)].

It appears, however, that the majority of the discussion of the Nominating Committee could justifiably be behind closed doors, for §100(1)(f) permits a public body to enter into executive session to discuss:

> the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Since the committee discusses matters leading to the appointment of particular individuals, executive sessions could in my opinion justifiably be held to engage in such discussions.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-334

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 15, 1979

Mr. Robert M. Cusack, Sr.
[redacted]

Dear Mr. Cusack:

I have received your letter of April 26, which was delivered to this office this morning. Please note the change in the address of the Committee that appears in the letterhead at the top of this page.

As requested, enclosed are copies of the Freedom of Information Law and an explanatory pamphlet on the subject.

With regard to your question concerning meetings, enclosed is a copy of the Open Meetings Law. It is noted that the Open Meetings Law requires that all meetings be convened open to the public and that executive sessions may be conducted only after having followed the procedure set forth in §100(1) of the Law. In relevant part, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Further, the subject matter appropriate for discussion in executive session is limited to those listed in paragraphs (a) through (h) of §100(1). Therefore, it is clear that a public body cannot go into executive session at any time, but rather only in accordance with the procedure described in the Law for the purpose of discussing matters specified in the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-335

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

COMMITTEE MEMBERS
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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 17, 1979

Ms. Jeanette C. McNamara
Town Clerk
North Salem, New York 10560

Dear Ms. McNamara:

I have received your letter of May 15 which raises two questions regarding interpretation of the Open Meetings Law.

The first situation that you described concerns a gathering held to discuss zoning "surrounding" a public school that was called by the Town Supervisor. According to your letter, the Supervisor invited the President of the School Board to attend a meeting in his office on a Saturday morning to discuss the matter. Also in attendance were two school board members, the Supervisor, three Councilmen and the Town Attorney. Since the meeting was "never advertised" you contend that a violation of the Open Meetings Law was committed.

In my opinion it is possible, though not certain, that the Open Meetings Law was violated.

Relevant to the situation is the definition of "meeting" appearing in §97(1) of the Law. Although the language of the definition is vague, the courts have interpreted the provision expansively. In brief, the state's highest court affirmed an Appellate Division decision which held that any convening of a quorum of a public body for the purpose of discussing public business is a meeting, whether or not there is an intent to take action, and regardless of the manner in which the meeting may be characterized. [see Orange County Publications v. Council of the City of Newburgh, 60 A.D. 2d 409, aff'd 45 NY 2d 947].

Also relevant is the definition of "public body" [§97(2)], which makes reference to the requirement of a quorum. The term "quorum" is specifically defined in §41 of the General Construction Law, and one of the conditions precedent to the convening of a quorum is that reasonable notice be given to all the members. In view of the foregoing, although a majority of the total membership of the Town Board may have been present, if notice was not given to all the members, there was no quorum and therefore no meeting. On the other hand, if reasonable notice was given to each member of the Town Board, the gathering was a meeting subject to the Open Meetings Law in all respects that should have been preceded by compliance with the notice provisions appearing in §99 of the Law.

It is noted at this juncture that §99 does not require that a public body "advertise" its meetings. In brief, §99(1) states that if a meeting is scheduled a week in advance, notice must be given to the public and the news media not less than seventy-two hours prior to the meeting. When meetings are scheduled less than a week in advance, §99(2) requires that notice be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Further, §99(3) specifically states that an agency need not publish a legal notice.

Your second question concerns the ability of the Town Attorney to meet with the Town Board to discuss pending litigation pursuant to §103 of the Open Meetings Law without calling executive session.

In my opinion, the answer must be in the affirmative. Section 103 of the Law states that three areas of discussion are exempt from the Open Meetings Law. Stated differently, if a matter is exempt, the Law simply does not apply, and a public body need not provide notice or follow the procedure for entry into executive session.

In terms of the specific question raised, §103(3) provides that the Law does not apply to "matters made confidential by federal or state law". Since the attorney-

client relationship is privileged under the Civil Practice Law and Rules, discussion held pursuant to the attorney-client relationship may in my opinion be held outside the scope of the Open Meetings Law.

An executive session is clearly a portion of an open meeting during which the public may be excluded. In addition, §100(1) of the Law requires public bodies to follow a specified procedure prior to entry into executive session. Nevertheless, as noted earlier, if a matter is exempt from the provisions of the Open Meetings Law, the procedures and requirements of §100(1) would not in my opinion be applicable.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-336

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 23, 1979

Ms. Sheila J. Zive
[redacted]

Dear Ms. Zive:

I have received your letter of May 15 as well as the materials appended to it. Your questions pertain to the degree of compliance with the Open Meetings Law of several boards within the Village of Dobbs Ferry.

Your first area of inquiry concerns the status of the Nominating Committee under the Open Meetings Law. As stated in my letter to you of May 10, despite my agreement with your contention that the Nominating Committee should be considered a public body subject to the Open Meetings Law, the only appellate court decision rendered to date concerning advisory committees held that such committees are outside the scope of the Law. Nevertheless, as I mentioned on May 10, I am hopeful that the Open Meetings Law will be amended this session to insure that advisory bodies, such as the Nominating Committee, will in the future be subject to the Open Meetings Law.

The second area of inquiry focuses on a memorandum of changes in a proposed budget to which reference was made in a newsletter sent to the residents of the Village. The question involves when changes in the proposed budget were made. You have indicated that a review of minutes of the Board of Trustees leads one to believe that meetings of the board were held on April 17 and April 19. According to the minutes, the changes in the budget were not discussed at either of those meetings. As such, by implication you have alleged that other meetings, none of which were preceded by notice or open to the public, were held for the purpose of discussing changes in the budget.

If meetings were held by the Board of Trustees for the purpose of discussing or changing the budget, they should in my opinion have been open to the public and preceded by notice.

While the definition of "meeting" appearing in §97(2) of the Law is vague, the courts have interpreted the definition expansively. In brief, the Court of Appeals, the state's highest court, affirmed an Appellate Division decision that held that any convening of a quorum of a public body for the purpose of discussing public business is a "meeting" that falls within the framework of the Law, regardless of the manner in which the gathering is characterized (see Orange County Publications v. Council of the City of Newburgh, 60 A.D. 2d 409, aff'd 45 NY 947). Moreover, a recent decision held that discussions of budget cuts did not fall within any of the exceptions for executive session enumerated in §100(1) of the Law (Orange County Publications v. City of Middletown, Supreme Court, Orange County, December 26, 1978). In so holding, the court stated that:

> "...personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of §100, for which the Legislature has authorized closed 'executive session.' Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of subdiv. 1.f. of §100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law..."

In addition, §99 of the Law requires that notice be given to the public and the news media prior to all meetings. If a meeting is scheduled at least a week in advance, notice must be given to the public and news media not less than seventy-two hours prior to the meeting. If the meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting.

In sum, if the Village Board of Trustees discussed the budget, its gatherings for the purpose of those discussions were in my view meetings that should have been open to the public and preceded by notice given in conjunction with the provisions described earlier.

Your third question concerns information that you received from a resident to the effect that a "secret meeting" of the Parks and Recreation Commission was held on April 25 during which the Mayor, the Board of Trustees and other Village Officials were present. To reiterate advice given in previous paragraphs, any gathering of a quorum or public body, whether it is the Village Board of Trustees or the Parks and Recreation Commission, is a meeting subject to the Open Meetings Law. Consequently, if the allegation that you made regarding the "secret meeting" is accurate, the Open Meetings Law was likely violated.

Your fourth question concerns a meeting of the Zoning Board of Appeals during which the Board consulted with the Village Attorney in "another room." Having reviewed the minutes, it is noted that I could not locate any reference to closing the meeting for the purpose of discussing a matter with the Village Attorney. However, even if the meeting was closed, it appears doubtful that any violation of the Open Meetings Law was committed. Section 103 of the Law lists three exemptions from the Law. Stated differently, the provisions of the Open Meetings Law simply do not apply to three areas of discussion. Of relevance in this instance is §103(3), which states that the Law does not apply to "matters made confidential by federal or state law." Since the relationship between a municipal attorney and his client, the Zoning Board, for example, is privileged, discussions held pursuant to the attorney-client relationship are in my opinion privileged and therefore outside the scope of the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Rolon Reed, Mayor
Board of Trustees
Zoning Board of Appeals

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1147
OML-AO-337

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 24, 1979

Mr. Robert J. Whalen
[redacted]

Dear Mr. Whalen:

I have received your letter of May 23, which raises questions under both the Freedom of Information Law and the Open Meetings Law.

Your first question concerns rights of access to the time sheets of an internal auditor employed by the Brentwood School District. You are interested in reviewing time sheets of his work from January to the present.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as a school district, are available, except those records or portions thereof that fall within one or more categories of deniable information enumerated in §87(2)(a) through (h) of the Law (see attached, Freedom of Information Law).

In my view, none of the exceptions to rights of access could appropriately be raised to withhold the time sheets that you are seeking.

While §87(2)(b) of the Law provides that an agency may withhold records or portions thereof which if disclosed would result in an "unwarranted invasion of personal privacy," case law interpreting the privacy provisions of the Law in my view can be cited as a basis for disclosure. The courts have consistently determined that public employees require less protection in terms of privacy than the public generally. In brief, the courts have held that records that are relevant to the performance of the official duties of public employees are accessible, for disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Farrell v. Village

Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. Conversely, portions of records that identify public employees that have no relevance to the performance of their official duties may justifiably be withheld, for disclosure would in such instances result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

Under the circumstances, a time sheet indicating when a public employee works is in my opinion clearly relevant to the performance of his official duties. Consequently, I believe that disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy.

I would like to point out that information irrelevant to the performance of official duties found on the time sheet, such as a social security number, for example, may in my view be deleted from the time sheet. Nevertheless, the remainder should be disclosed.

The second question pertains to the action of the President of the Brentwood Board of Education, who, according to your letter, takes official votes without permitting the remaining members of the Board to state "whether they are in favor or against or abstaining from the motion being presented." You have also indicated that "the President has voted in behalf of all the trustees" with respect to "several motions critical to the School District."

In my opinion, a single member of a board, regardless of his or her title as president or chairman, cannot act singly on behalf of the remaining members of a board.

The actions taken by a school board are governed in part by the provisions of the Open Meetings Law, which is applicable to all public bodies that are required to act by means of a quorum [see attached, Open Meetings Law, §97(2)].

In this regard, other statutes make clear that only a majority of the total membership of a public body, including the School Board, may act on behalf of the body. Specifically, I direct you to the definition of "quorum" which is defined in §41 of the General Construction Law as follows:

> "[W]henever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform an exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

The quoted provision clearly applies to school boards. Consequently, the Brentwood Board may act only by means of a quorum, a majority vote of its total membership.

Moreover, it is clear that the language in the Education Law evidences an intent that a group of individuals acts as a corporate board of directors for a school district, a public corporation. Specifically, §2(14) of the Education Law states that:

> "[T]he term 'board of education' shall include by whatever name known the governing body charged with the general control, management and responsibility of the schools of a union free school district, central school district, central high school district, or of a city school district."

By means of the reference to a "body," it is clear that no single member of a board of education has a greater vote or authority than any other member of a board of education. Consequently, the President of the Board cannot in my opinion act individually on behalf of the Board as a whole.

Lastly, it is also important to note that the Freedom of Information Law, §87(3)(a), requires that the School District compile a record of votes identifiable to each member in every instance in which a vote is taken.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Guy DiPietro
Anthony Felicio, President

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1150
OML-AO-338

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 28, 1979

Mr. Arthur G. Wood
[redacted]

Dear Mr. Wood:

I have received your letter of May 22. Your inquiry has been presented in chronological order, and my comments will appear in like manner.

The first question concerns closed meetings held by "Party A", which is represented by all five members of the Village Board of Trustees. Stated differently, all of the members of the Village Board of Trustees are members of a single political party. Therefore, the question is whether the gatherings that you described are "political caucuses" exempt from the Open Meetings Law, or meetings subject to the Law.

Section 103(2) of the Law states that the Law does not apply to "deliberations of political committees, conferences and caucuses." It is noted at this juncture that in the past it has been advised that public bodies represented by a single political party do not engage in "political" caucuses when they are discussing the business of the public body rather than business of a political party nature. If, as in the example that you described, there was a work session held to discuss the budget prior to its adoption, I believe that such a gathering was held for the purpose of discussing public rather than political party business. As such, it should in my view have been open to the public.

It is emphasized that the definition of "meeting" appearing in §97(1) of the Law has been construed broadly by the courts. Specifically, the Court of Appeals, the state's highest court, affirmed an Appellate Division decision which held that any convening of a quorum of a public body for the purpose of discussing public business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in

which it may be characterized (Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947). The focal point of both appellate decisions was the statement of intent in the Law (see §95), which indicates that every step of the decision-making process is intended to be subject to the Law. From my perspective, to close the deliberative process and preclude public observance of the performance of public officials by classification of a meeting as a political caucus would contradict the stated purpose of the Law as evidenced in the statement of intent. Therefore, in my opinion, a meeting of the entire membership of the Board of Trustees for the purpose of discussing public business cannot be characterized as a political caucus, thereby nullifying the requirements of the Open Meetings Law. On the contrary, I believe that such a gathering is a meeting subject to the Law in all respects.

In addition, §99 of the Law requires that all meetings must be preceded by notice. If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than seventy-two hours prior to the meeting. If the meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. As such, notice must be given prior to all meetings, whether regularly scheduled or otherwise.

Your last comment concerns your attempts to study the Village's tentative budget. Although the Village Clerk said that you were "welcome" to review the tentative budget, you wrote that you were informed later that you could not keep copies of the tentative budget prepared for the public hearing unless you paid twenty-five cents per page. In this regard, once you have obtained a record, I believe that it is your property. I do not believe that a Village official can refuse to permit you to keep it unless you pay a fee. The Freedom of Information Law permits an agency to assess a fee of no more than twenty-five cents per photocopy. Consequently, in most circumstances, I would agree that the Village could charge on that basis. However, there are special provisions in the Village Law pertaining to the tentative budget. Section 5-504 of the Village Law requires that the budget officer for a village "shall furnish a copy of the tentative budget and the budget message, if any, to each member of the board of trustees and he shall reproduce for public distribution as many copies as he may deem necessary."

Although the quoted provision does not state how many copies of the tentative budget must be reproduced or that they should be made available free of charge, it would appear that the purpose of disclosing a tentative budget is to permit the public to become familiar with its contents. It appears further that there is an intent in the Village Law that a number of copies of a tentative budget be made available to the public free of charge. Since I am unaware of the numbers of copies prepared or members of the public that requested copies, I cannot appropriately comment with respect to the requirement of a fee under the circumstances. Nevertheless, it appears that the intent of the provision concerning the tentative budget and its disclosure is to enhance the ability of the public to learn the nature and contents of a tentative budget.

You also mentioned "reports from reliable sources" of gatherings of the members of the Board in the Village Hall without notice to the news media or the public. Again, I must emphasize that the state's highest court held that any gathering of a quorum of a public body for the purpose of discussing public business is a meeting. Whether the meeting is characterized as "formal" or "informal" is irrelevent when the ingredients described in the judicial decisions are present.

The next situation that you described concerns the firing of the acting fire chief and the selection of his successor. You indicated that a Civil Service examination was given and that the single individual who passed was neither chosen nor interviewed. I have contacted the Director of the Division of Municipal Affairs of the State Department of Civil Service on your behalf. He informed me that there is no requirement that the chief be chosen from a list consisting of one who passed an examination. In essence, based upon the information given to me, the Village did not act improperly with respect to its selection of a new fire chief.

Although the action taken regarding the fire chief may have been proper, it is important at this juncture to describe the structure of the Open Meetings Law. As noted earlier, the term "meeting" has been construed broadly by the courts. Further, §98(a) of the Law requires that all meetings be convened as open meetings. While executive sessions may be held to discuss certain subject matter, it is clear that an executive session is a portion of an open meeting during which the public may be excluded; it is not separate and distinct

from a meeting [see §97(3)]. Moreover, the Law sets forth a procedure for entry into executive session. Specifically, §100(1) of the Law states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the foregoing, a public body must take the steps described above in order to hold an executive session. Additionally, discussion in executive session is restricted to the subjects described in paragaphs (a) through (h) of §100(1). Consequently, a public body cannot go into executive session to discuss the subject of its choice; it may do so only in accordance with the provisions of §100 of the Open Meetings Law.

Lastly, you have asked what can be done to insure that the Open Meetings Law is followed. Generally, I believe that the public and the news media by being present, interested and informed can do much to insure compliance with the Law. In terms of legal remedies, if, for example it is known in advance that a closed meeting will be held, injunctive relief may be sought which would preclude a public body from holding a closed meeting. If, for example, a public body takes action behind closed doors that should have been taken during an open meeting, a court has the authority to make the action taken in violation of the Law null and void. A court also has discretionary authority to award reasonable attorney fees to the party that prevails.

A copy of my response to you will be sent to the Village Board of Trustees. Although an opinion of this Committee is not legally binding, the courts have in many instances cited the opinions as the basis for their own. Consequently, while the Committee has no power to enforce the Law, the courts have often given great weight to opinions of the Committee.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Village Board of Trustees

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-339

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 29, 1979

Mr. James A. Locke
Harter, Secrest & Emery
700 Midtown Tower
Rochester, New York 14604

I have received your letter of May 25 as well as the memorandum appended to it regarding possible violations of the Open Meetings Law.

Having reviewed the materials, I would like to confirm that I did speak with you regarding your contentions, which I agree to cite as additions and modifications to my letter of April 9 addressed to John J. Forken. Further, I have enclosed a copy of my telephone log indicating that I spoke to you on May 7, contacted Pat Ballinger of the United States Department of Health, Education and Welfare following our conversation, and that I called you to describe my conversation with Ms. Ballinger and confirm the contentions that you raised.

Your first point is that the Family Educational Rights and Privacy Act does not apply to the Board's deliberations if no education records are discussed. I discussed the matter with Ms. Ballinger of HEW as indicated in my telephone log and agree with your argument. Moreover, a close review of my letter to Mr. Forken expressed concurrence with your contention. Specifically, in the fourth paragraph on page 2 of the letter, I wrote that:

> "...the federal Family Educational Rights and Privacy Act (commonly known as the 'Buckely Amendment') provides in a nutshell that records identifiable to a particular student under the age of 18 are confidential with respect to all but the parents of the student. Consequently, any records or discussion thereof pertaining to a specific student would be confidential under federal law."

Clearly, the advice given in my letter of April 9 insofar as it pertains to the Family Educational Rights and Privacy Act made reference to a discussion relative to "records." If education records are not discussed, the federal Act is inapplicable and the Open Meetings Law would be the statute under which the Board would operate.

Secondly, you have contended that "[E]ven if education records are involved in any deliberations, parents of the child in question may consent in writing to a public discussion of the matter. If parents consent and request a public discussion, then the deliberations of the Board are governed by the Open Meetings Law." Once again, I agree with you, for parents of students have the ability to waive the protections offered by the Family Educational Rights and Privacy Act. When the parents do so, discussion by a board of education would be governed by the provisions of the Open Meetings Law.

And third, if no education records were involved in the deliberations of the School Board and the Open Meetings Law served as the applicable statute regarding the conduct of discussion by the Board, I would agree with your contention that the discussions would under the circumstances described have to be held in open session. Based upon the facts presented, neither the exemptions appearing in §103 of the Open Meetings Law nor the grounds for executive session enumerated in §100(1) could in my view have been appropriately raised to close the meeting. You stated in your memorandum that some argued that the discussion constituted a "personnel matter," and therefore could be closed. However, a review of the grounds for executive session appearing in the Open Meetings Law leads one to a contrary conclusion. The only relevant exception for executive session would be §100(1)(f), which states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

None of the bases for entry into executive session described in the quoted provision could in my opinion have been appropriately cited to close the meeting.

In sum, if the provisions of the Family Educational Rights and Privacy Act were inapplicable and there were no grounds for entry into executive session, the discussion should have been held in public.

In view of the foregoing, I believe that the additions and modifications presented in your letter and in the preceding paragraphs should be considered in conjunction with my letter of April 9.

I certainly have no objections to the distribution of copies of my response to your fellow Board members or any one else to evidence your good faith as an attorney and a Board member.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: John J. Forken

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-340

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 29, 1979

Mr. John P. Mazzeo
[redacted]

Dear Mr. Mazzeo:

I have received your letter of May 23 and the minutes appended to it. Your inquiry concerns the propriety of action taken by the School Board of the Smithtown Central School District #1 under the Open Meetings Law.

The first area of inquiry concerns the legality of an executive session held by the Board on April 24. Your letter indicates and the minutes confirm that a motion was made and carried for entry into executive session without any description of the nature of discussion to be held. You also wrote that Mr. Pick, a member of the Board, stated that no formal business would be transacted during executive session.

In my opinion, the minutes indicate a failure to follow the procedure required by the Law for entry into executive session and the statement by Mr. Pick, if accurate, is reflective of a lack of familiarity with the leading judicial decision rendered under the Open Meetings Law.

With respect to the procedure for entry into executive session, §100(1) of the Law states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

The ensuing paragraphs (a) through (h) of §100(1) specify and limit the subject matter that may appropriately be discussed in executive session. As such, it is clear that a public body may not enter into executive session to discuss the subject of

its choice, but rather must identify the subject to be discussed, which must be consistent with one or more of those proper subjects for executive session enumerated in the Law.

Second, the state's highest court affirmed an Appellate Division decision which construed the definition of "meeting" expansively (see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947). Section 97(1) of the Law defines "meeting" as "the formal convening of a public body for the purpose of officially transacting public business." In its discussion of the word "formal," the Appellate Division stated that the term:

> "...was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body or matters pending before a public body." (id. at 415)

Further, the Court held that the term "transact" should be accorded its ordinary dictionary definition, i.e. to discuss or carry on business (id.). In sum, any convening of a quorum of a public body for the purpose of discussing public business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which the gathering may be characterized. Therefore, although Mr. Pick may have contended that no business would formally be transacted, the discussion by the School Board of public business in my opinion and as expressed judicially fell within the scope of the Law and should have been open unless a proper executive session could have been held.

Your second question concerns minutes and the ability of the School District Clerk to "attest" as to their accuracy. In this regard, the Open Meetings Law does not designate or direct that a particular individual be responsible for the compilation of minutes. The Law simply states that minutes must be compiled in accordance with the criteria described in §101 of the Law. Further, there is no requirement that a district clerk be present at an executive session for the purpose of taking minutes. Although §100(2) of the Law permits a clerk to be present at an executive session, there is no requirement that the clerk be present.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-341

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 29, 1979

Mr. Robert F. Reninger
[redacted]

Dear Mr. Reninger:

I have received your letter of May 25 concerning your ability to attend meetings of the Committee on the Handicapped designated by the Greenburgh Central #7 School District. According to your letter, through its Director of Special Education Services, you have been advised that the District can prevent you from attending meetings of the Committee, including those portions of meetings during which a review of your son's special education program is discussed.

In my opinion, under provisions of the Open Meetings Law, the Education Law, the regulations promulgated by the Commissioner of Education and federal law, you have the right to attend the meetings that you have described.

It is noted initially that the Committee on the Handicapped is in my view a "public body" subject to the New York Open Meetings Law. "Public body" is defined in §97(2) of the Law to include:

> "any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

The Committee is an entity consisting of more than two members that is required to act by means of a quorum under §41 of the General Construction Law. In addition, the description of duties of a Committee on the Handicapped appearing in §4402 of the Education Law indicates that such a Committee transacts public business and performs a governmental function for a public corporation, a school district. Therefore, I believe that the Committee is subject to the Open Meetings Law in all respects.

Nevertheless, it is likely that portions of the meetings of the Committee on the Handicapped fall outside the scope of the Open Meetings Law. Specifically, §103(3) of the Law states that its provisions shall not apply to "matters made confidential by federal or state law." In this regard, the federal Family Educational Rights and Privacy Act provides that "education records" identifiable to particular students are confidential to all but the parents of the students. Since education records are generally confidential, a discussion of such records would constitute a matter made confidential by federal law and therefore would be outside the scope of the Open Meetings Law. For example, if the Committee is engaged in a discussion of a particular student other than your own child, the discussion would be confidential to all but the parent of the student, who could assert his or her right to engage in a discussion of education records pertaining to his or her child. By coupling the rights granted by federal law and the Open Meetings Law, a discussion of a particular child by a Committee on the Handicapped would in my view be open to the members of the Committee and the parents of the child.

Perhaps most importantly, §4402(3)(c) of the Education Law provides that a Committee on the Handicapped shall:

> "[P]rovide written prior notice to the parents or legal guardian of the child whenever such committee plans to modify or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child and advise the parent or legal guardian of the child of his opportunity to address the committee, either in person or in writing, on the propriety of the committee's recommendations on program placements to be made to the board of education or trustees."

In addition, §200.4(f)(2) of the Commissioner's regulations regarding "planning conferences" states that:

> "[P]lanning conferences to develop an individualized education program shall be conducted in accordance with the following:
>
> (i) The conference for each new handicapped pupil shall be conducted as soon as possible, but no later than 30 days, after the child enters the special education program.
>
> (ii) Participants at the planning conference shall include, but shall not be limited to, the pupil's teacher, the pupil whenver appropriate, the parent or legal guardian, a representative of the school district, other than the child's teacher, who is qualified to provide, or supervise the provision of special education, and other individuals at the discretion of the parent or agency. A member of the evaluation team, or a person who is knowledgeable about the evaluation procedures used with the child, shall also participate in the planning conference for a handicapped child who has been evaluated for the first time.
>
> (iii) The notice of the planning conference given to parent or guardian of the pupil shall inform such parent or legal guardian that the conference will be conducted at a date and time which is mutually acceptable to the parent or legal guardian and the employees of the school district.
>
> (iv) If it is not possible or practicable for the parent or legal guardian to attend the conference, other alternatives may be attempted, including individual or conference telephone discussions.

(v) In order to assure active parent participation, an interpreter may accompany the parent or legal guardian to allow communication in his native or primary language."

In view of the provisions of the Education Law and the regulations quoted above, I believe that there is evidence of a clear intent to encourage parents to participate in the deliberations of a Committee on the Handicapped with respect to their children.

A copy of my response will be sent to the Director of Special Education Services of the District. Perhaps its contents will enhance your ability to avail yourself of rights granted by the statutes and regulations discussed. If you meet with resistance, it is suggested that you contact the Office of the Commissioner of Education.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Director of Special Education Services

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-342

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 6, 1979

Ms. Vivian M. Joynt
[redacted]

Dear Ms. Joynt:

I have received your letter of May 28 regarding the implementation of the Open Meetings Law by the Lackawanna City School District.

First, as you requested, enclosed are copies of recent documentation concerning both the Freedom of Information Law and the Open Meetings Law. You will find among the materials indices to advisory opinions rendered under both statutes. As a general matter, copies of opinions are not sent to those on the Committee's mailing list. However, the indices to advisory opinions note the latest opinions by number and are sent on request. Your name will be placed on the mailing list to receive updated information. Further, I believe that the Legislature will pass clarifying amendments to the Freedom of Information Law and the Open Meetings Law this session.

Second, your specific inquiry concerns the procedure for conducting executive sessions. According to your letter, the School Board recently convened a special meeting for the purpose of approving a deficit budget. You have also indicated that the meeting was not publicized, and that an executive session was called with no motion and the matter was discussed behind closed doors. Having questioned the legality of the executive session, you wrote that the School District Attorney informed you that "he was sure that discussing finances and budget is legal, because of a ruling he had received sometime in the past from Robert Stone, Chief Counsel, State Education Dept."

In my opinion, the discussion of the deficit budget should have been held during an open meeting and the calling of an executive session violated the Open Meetings Law.

In terms of procedure, the Open Meetings Law is clear. Section 100(1) of the Law states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the foregoing, a public body must take specific affirmative steps in order to enter into executive session. A motion must be made during an open meeting, it must identify the general area of discussion for executive session, and it must be carried by a majority vote of the total membership of a public body. Further, the subject matter appropriate for executive session is limited to those areas enumerated in paragraphs (a) through (h) of §100(1). Consequently, a public body cannot enter into executive session to discuss the subject of its choice or without following the procedure described in the Law.

In terms of the substance of the discussion, none of the grounds for executive session could in my view have been appropriately raised under the circumstances. The most relevant exception for executive session if §100(1)(f), which states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

The Committee has consistently advised that the quoted provision is intended to protect personal privacy; it is not intended to be used to shield matters of policy under the guise of privacy. Moreover, a judicial decision regarding the legality of an executive session convened for the purpose of discussing a budget held that such a discussion was not appropriate for executive session and should have been held during an open meeting (Orange County Publications v. City of Middletown, Supreme Court, Orange County, December 26, 1978).

Further, even when a discussion may properly be discussed during an executive session, any vote to appropriate public monies must be taken during an open meeting. Consequently, if a vote was taken behind closed doors to appropriate public monies, a violation of the Open Meetings Law was committed.

Lastly, although it is possible that Mr. Stone may have advised that a discussion of the budget may be held in executive session, I question the accuracy of that contention. This office has had a longstanding relationship with the Office of Counsel of the Education Department and I believe that Department attorneys are familiar with the Open Meetings Law and the case law rendered under the Open Meetings Law. In addition, it is clear that the Open Meetings Law directs that the Committee on Public Access to Records shall be the entity that provides advice under the Open Meetings Law. Therefore, although the Education Department may in some instances provide assistance to school districts, the sole agency of government having the duty to advise with respect to the Open Meetings Law is this Committee.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 343

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 8, 1979

Mr. Edward J. Tully, Jr.
[redacted]

Dear Mr. Tully:

I have received your letter of June 6 in which you requested information regarding the law governing the election of the officers of a volunteer fire company. You have also asked what law would be applicable regarding the defacement of a ballot and whether such an action would void the ballot.

I must admit at the outset that I have no expertise regarding the corporate affairs of a fire company. Nevertheless, having performed some legal research on your behalf, I believe that the corporate functions of a volunteer fire company, including the election of officers, would be governed by Article 6 of the Not-for-Profit Corporation Law. In particular, §603 pertains to meetings of members, and §604 concerns special meetings for the election of directors.

In addition, and perhaps most importantly with respect to your question, §610 of the Not-for-Profit Corporation Law concerns the selection of inspectors at meetings, and in subdivision (b) of the cited provision, it is stated that "[O]n request of the person presiding at the meeting or any members entitled to vote thereat, the inspectors shall make a report in writing of any challenge, question or matter determined by them and execute a certificate of any fact found by them..."

In view of the foregoing, it is suggested that you attempt to locate the Not-for-Profit Corporation Law at a law library near you in Suffolk County. I believe that review of Article 6 and the provisions to which reference was made earlier will be helpful to you.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1167
OML-AO-344

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 15, 1979

Mr. Paul Feiner
[redacted]

Dear Mr. Feiner:

I apologize for the delay in responding to your letter. Your question concerns the application of the Freedom of Information Law to records in possession of the State Legislature and the status of committee of a public body under the Open Meetings Law.

First, you have asked whether the Freedom of Information Law requires the State Legislature "to disclose all information about the workings of the legislature", including a detailed line item budget and a monthly list of staff assignments, for example. In this regard, I direct your attention to §88 of the Freedom of Information Law, which describes the obligations of the State Legislature under the Law. Specifically, §88(2) lists the categories of records in possession of the State Legislature that must be made available. Since budgets, for instance, are passed in the form of bills, such records are available pursuant to paragraph (a) of the cited provision. In addition, paragraph (f) provides access to:

> "internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law..."

Therefore, statistical or factual tabulations that relate to the budget, the budget process, and the "workings" of the Legislature in which you were interested are in my view available. Additionally, §88(3)(b) requires each house of the Legislature to maintain "a record setting forth the

name, public office address, title and salary of every officer and employee." Therefore, one can determine who works for the Legislature and how much legislative employees are paid.

It is emphasized, however, that §89(3) of the Freedom of Information Law states that an entity subject to the Law need not create a record in response to a request. Consequently, if there is no line item budget in existence, for example, the Legislature would have no obligation to create such a list on your behalf.

With respect to meetings of committees of a public body, this Committee has consistently advised that such entities are public bodies subject to the Open Meetings Law in all respects. While committees and subcommittees might not consist of a quorum of a governing body, they are in the Committee's view entities separate and distinct, which themselves must act by means of a quorum, a majority of their total membership.

Nevertheless, the only appellate court decision rendered to date on the subject held that committees and subcommittees that have no power to take final action, but merely the authority to recommend, do not "transact" public business and therefore are not public bodies subject to the Open Meetings Law (Daily Gazette Co., Inc. v. North Colonie Board of Education, 412 NYS 2d 494).

The ramifications of the Daily Gazette decision are discussed in the Committee's third annual report to the Legislature on the Open Meetings Law, a copy of which is attached. In the report, legislation was recommended to remedy the situation and to give effect to the clear intent of the Legislature as evidenced in the debate that preceded passage of the Open Meetings Law. At the present time, a bill to amend the Open Meetings Law which if enacted would clearly include committees and subcommittees within the definition of "public body" has passed the Assembly and is now before the Senate. I am hopeful that the bill will be passed by the Senate this session. I have enclosed a copy of the bill for your consideration.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-345

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 20, 1979

Ms. Donna Snyder
Buffalo Courier-Express
P.O. Box 253
Route 17
Salamanca, NY 14779

Dear Ms. Snyder:

I have received your letter regarding the propriety of executive sessions held by the Cattaraugus County Board of Health at its monthly meetings. Specifically, you have stated that the County Attorney has advised the Board that it may enter into executive session to discuss "possible litigation."

In my opinion, "possible litigation" is not an appropriate subject for discussion in executive session.

Section 100 of the Open Meetings Law states that, after having followed the procedure specified in subdivision (1) of the cited provision, a public body may enter into executive session to discuss "proposed, pending or current litigation" [§100(1)(d)]. In my view, the intent of the quoted provision is to enable public bodies to discuss ongoing or imminent litigation and their strategy pertaining to such litigation. The provision does not in my opinion extend to discussion relative to "possible" litigation for the discussion of virtually any topic could be the subject of "possible litigation." I believe that there must be some imminence of litigation or pendency of litigation itself to convene an executive session under §100(1)(d).

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Cattaraugus County Board of Health

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-346

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 21, 1979

Ms. Constance Frederickson
[redacted]

Dear Ms. Frederickson:

Thank you for your continued interest in compliance with the Open Meetings Law. Your inquiry concerns the propriety of an executive session held by the Board of Education of the Evans-Brant (Lakeshore) School District. In addition, you have asked that I apprise the Board of the intent and rationale of the Open Meetings Law.

According to your letter, on April 17, the School Board at a regular meeting entered into executive session to write the propositions to be submitted to the voters regarding the 1979-80 budget. You have indicated that a motion was made and passed without discussion and that the Board then entered into executive session, notwithstanding your questions regarding the legality of the executive session.

Based upon the facts that you presented, the executive session in question was in my view held in violation of the Open Meetings Law.

Although the Law defines "meeting" in a manner that is vague [see attached Open Meetings Law, §97(1)], the state's highest court, the Court of Appeals, has confirmed that the Law should be interpreted in accordance with its broad statement of intent. Section 95 of the Law, entitled "legislative declaration," states that:

> "[I]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.

> The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

Based upon the definition, the Court of Appeals, affirmed an Appellate Division decision which held that any convening of a quorum of a public body for the purpose of discussing public business is a meeting subject to the Open Meetings Law that must be open, whether or not there is an intent to take action and regardless of the manner in which such a gathering may be characterized [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. In so holding, the courts have confirmed the notion expressed by the Legislature that every step of the deliberative process is intended to be open under the Law and that is is the openness of this process that is necessary to maintain "our democratic society."

Section 100 of the Law, however, provides that executive sessions may be held in accordance with the procedure described in the Law and for the purposes specified in the Law. In relevant part, §100(1) of the Law states that:

> "...a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

The ensuing paragraphs (a) through (h) specify and limit the subject matter that may be discussed in executive session. Based upon the information provided in your letter, none of the grounds for executive session enumerated in the Law could have appropriately been cited to enter into executive session or otherwise exclude any member of the public from the deliberations of the Board.

It is also noted that the Legislature recently passed amendments to strengthen the Open Meetings Law and reflect the holding of the Court of Appeals to which reference has been made. I have enclosed a copy of the legislation, which is now before the Governor, for your consideration.

In order to insure that the Board will be cognizant of the intent of the Law, I will send copies of this opinion as well as the existing Law to the Board.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Evans-Brant (Lakeshore) School Board
c/o Helen S. Garland, School District Clerk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-347

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 22, 1979

Mr. Al McWilliams
The Daily News
2 Apollo Drive
Batavia, NY 14020

Dear Mr. McWilliams:

I have received your letter of June 13 in which several questions regarding the Open Meetings Law have been raised.

It is noted at the outset that the Legislature recently passed amendments to the Open Meetings Law. Although the Governor has not yet signed the legislation into law, which if enacted will become effective October 1, I am hopeful that he will do so. Many of the questions that you raised pertain to common problems that would be solved at least in part by the legislation, a copy of which is enclosed with the introducers' Memorandum in Support.

Your first question concerns the status of advisory bodies under the Law. Although the Committee has continually advised that advisory bodies fall within the definition of "public body" appearing in §97(2) of the Law, the Appellate Division, Third Department, in Daily Gazette Co., Inc. v. North Colonie Board of Education (412 NYS 2d 494), held that advisory bodies which have no authority to take final action "do not transact public business" and therefore are outside the scope of the Law. The amendments, however, if signed into law, will specifically make reference to committees, subcommittees and similar bodies.

Your second question is whether a board or a governing body has the ability to convene a special meeting and act during a special meeting "when the session was never announced to the media or the public." I agree with your contention that "some public notice

is required, even if it is the day of the meeting." In this regard, §99(1) of the Law states that a meeting scheduled at least a week in advance must be preceded by notice given not less than seventy-two hours prior to the meeting. Section 99(2) states that notice of all other meetings, including the special meeting to which you made reference, must be preceded by notice given "to the extent practicable" to the public and the news media at a reasonable time prior to the meeting. Therefore, notice must be given to the public and the news media prior to all meetings, whether they are regularly scheduled or otherwise.

Since the Law does not state how notice must be given, the amendments will provide that notice must be "conspicuously posted in one or more designated public locations" prior to all meetings. As such, notice of all meetings under the amendments would be required to be posted in one or more specific locations.

Your last question concerns the grounds for executive sessions, particularly those concerning "personnel matters." In this regard, §100(1)(f) of the Law now states that a public body may enter into executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

The Committee has consistently advised that the provision quoted above is intended largely to protect privacy, not to shield matters of policy under the guise of privacy. Consequently, as in the situation that you described, a discussion relative to policy, i.e. whether an appointment should be permanent or temporary, should in my opinion be discussed in public.

Again, I believe that the amendments will tend to close the loopholes concerning so-called "personnel matters." The existing language states that a public body may enter into executive session to discuss certain matters concerning "any person or corporation." The word "any" will be deleted and replaced by a "particular" person or corporation. As such, it will be clear that executive sessions will be appropriate only with respect to discussion of specific personnel rather than personnel generally.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-348

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 28, 1979

Mr. Jack Manley
School District Attorney
P.O. Box 420
Ilion, New York 13357

Dear Mr. Manley:

I have received your letter of June 25 concerning the legislation to amend the Open Meetings Law.

At this juncture, although both houses of the Legislature have passed amendments to the Open Meetings Law, the Governor has neither received nor signed the legislation into law.

With respect to "work sessions" and similar gatherings, I believe that the definition of "meeting" as amended confirms and is consistent with the expansive interpretations of the existing definition rendered by the Appellate Division and the Court of Appeals in Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947. Consequently, I believe that the amendments serve to clarify the definition of "meeting" in conjunction with the direction that has been provided by the courts.

I have enclosed copies of the bill and the Memorandum in Support for your consideration.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 349

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 28, 1979

Mr. Irving Silver
The Canarsie Committee for
Better Transportation
1031 East 108 Street
Brooklyn, New York 11236

Dear Mr. Silver:

I have received your letter of June 23 in which you described an executive session held by the Board of the Metropolitan Transportation Authority ("MTA") and requested information regarding the Open Meetings and the Freedom of Information Laws.

According to your letter, you believe that you were illegally excluded from an executive session of the MTA Board on June 22, during which "the matter of the removal of TA's John deRoos" was discussed.

Although the Open Meetings Law generally requires that the deliberations of public bodies be held in full view of the public, §100(1) of the Open Meetings Law lists eight areas of discussion that may be held in executive session. Relevant to your inquiry is §100(1)(f), which states that a public body may enter into executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Since the provision quoted above permits a public body to hold an executive session to consider matters leading to the "removal" of a person, it appears that the executive session that you described was proper.

In conjunction with your request for materials, enclosed are copies of the Freedom of Information Law, two explanatory pamphlets on the subject, the regulations promulgated by the Committee, which govern the procedural aspects of the Law, the Open Meetings Law and a bill to amend the Open Meetings Law that is now before the Governor.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-350

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 3, 1979

Mr. Louis H. Engel, Jr.
Town of Ossining
Municipal Building
Ossining, New York 10562

Dear Mr. Engel:

Thank you for your letter of June 25 and your interest with complying with the Open Meetings Law. Your inquiry concerns the contents of a news article appended to your letter in which the Mayor of Briarcliff Manor announced that the Board of Trustees would meet in a closed session with Village attorneys to "weigh the various options" regarding litigation.

Although I agree with your contention that the public should be reasonably familar with the situation, it appears that the closed session to which reference was made could justifiably be held.

First, §100(1)(d) of the Open Meetings Law states that a public body may enter into executive session to discuss "proposed, pending or current litigation". Since the subject of discussion is ongoing litigation, I believe that the cited provision would be an appropriate basis for entry into executive session.

Second, §103(3) of the Law states that the provisions of the Open Meetings Law do not apply to "any matter made confidential by federal or state law". When a municipal board meets with its attorneys to gain the expertise of counsel, such discussions would likely fall within the scope of the attorney-client privilege and would constitute matters made confidential by state law. Therefore, to the extent that discussions fall within the privilege, they would be exempt from the Open Meetings Law.

Lastly, it is emphasized that the Open Meetings Law is permissive. Although a particular discussion might fall within one or more of the grounds for executive session or be exempt from the provisions of the Law, there is nothing in the Law that prohibits public discussion of a matter such as the one you described. Therefore, while a public body may enter into closed session to discuss pending litigation, there is no requirement that such a discussion be held behind closed doors.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Mayor George Kennard

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOML-AO-351

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 5, 1979

Mr. Paul A. Palmgren
[redacted]

Dear Mr. Palmgren:

Thank you for your most recent letter of June 18 and the materials appended to it.

In response to your question appearing at the end of your letter, the Legislature has indeed passed amendments to the Open Meetings Law that are now before the Governor for his signature. The legislation would accomplish many of the objectives recommended by the Committee in its most recent report to the Legislature. Assuming the Governor signs the legislation, it will become effective October 1.

I believe that many of the problems that have arisen under the Open Meetings Law will be solved by means of the amendments. Relevant to one of the questions that you have raised in the past is the so-called "personnel" exception for executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..." [Open Meetings Law, §100(1)(f)].

In its report to the Legislature, the Committee wrote that the quoted provision had been cited throughout the state as a means of discussing personnel generally in conjunction

with policy matters behind closed doors. The amendment to the Law, a copy of which is attached, will enable public bodies to discuss "personnel" matters only with respect to a "particular" individual or corporation. Consequently, I believe that a continuing problem will be solved should the Governor sign the legislation into law.

I have also enclosed a copy of the memorandum in support of the legislation.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1192
OML-AO-352

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 9, 1979

Mrs. Betty Connolly
[redacted]

Dear Mrs. Connolly:

I have received your letter of June 26 as well as the materials appended to it. Your letter and the materials appear to indicate a fundamental lack of understanding of the Open Meetings Law by the School Board of the Oceanside Union Free School District.

Since I cannot in good faith verify or agree that all of your allegations are accurate except by means of the documentation that you sent, the following will consist of a recitation of legal interpretations reflective of my opinion concerning the points that you raised regarding both the Open Meetings Law and the Freedom of Information Law.

It is emphasized at the outset that the state's highest court held that the definition of "meeting", while vague in terms of its specific language [see Open Meetings Law, §97(1)], should be construed expansively in accordance with the legislative declaration appearing in §95 of the Law. In brief, it was held that any convening of a quorum of a public body for the purpose of discussing its business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 547 (1978)]. Therefore, if, for example, the Board met to discuss various items at gatherings other than its regular or special meetings, those gatherings should have been convened as open meetings. Consequently, if meetings were held to discuss the contents of the proposition to which you made reference, those gatherings were meetings that should have been convened open to the public.

Section 99 of the Law requires that all meetings must be preceded by notice to the public and news media. When a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. As such, it is clear that notice must be given before all meetings, including those that might be classified as "special" or "emergency". In addition, the Legislature recently passed amendments to the Open Meetings Law that are now awaiting the Governor's signature. One aspect of the amendments would require that a public body designate one or more public locations where notice will be posted prior to all meetings. I have enclosed a copy of the amendments and the Memorandum in Support of the legislation for your consideration.

Next, exhibits F and I found in the materials you sent constitute agendas of special meetings held "for the purpose of calling for an executive session to discuss legal matters". In my view, the agendas represent a lack of understanding of the Open Meetings Law and two possible violations of the Law. First, a public body cannot in my opinion schedule an executive session in advance due to the definition of "executive session" [§97(3)] and the procedural requirements that must be followed by a public body prior to entry into executive session [§100(1)]. "Executive session" is defined as a portion of an open meeting during which the public may be excluded. Thus it is clear that an executive session is not separate and distinct from an open meeting but rather is a portion thereof. Further, §100(1) states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

The quoted provision requires that several affirmative steps be taken prior to entry into executive session. A motion must be made during an open meeting that is passed by a majority vote of the total membership of the public body, which identifies generally the subjects intended to be discussed behind closed doors. Moreover, the ensuing paragraphs (a) through (h) specify and limit the subjects that may appropriately be considered in executive session. In view of the definition and the requirements described above, I do not believe that a public body can schedule an executive session in advance, for it can never be known in advance whether a majority of the total membership of a public body will indeed vote to enter into executive session or whether the entire meeting will be devoted to matters that may properly be discussed in executive session.

The contents of your letter, the minutes and the agendas attached to your letter indicate that several executive sessions were held for the purpose of discussing "legal matters." In my opinion, a motion to enter into an executive session to discuss "legal matters" without more is insufficient. The most relevant exception for executive session is in §100(1)(d), which provides that a public body may enter into executive session to discuss "proposed, pending or current litigation." Based upon the documentation that you sent, there is no indication that pending litigation was discussed or that litigation would be in the offing. Moreover, I agree with the statement in your letter to the effect that virtually all matters discussed by a school board or by the board of any other public corporation might be considered a "legal matter". In a similar vein, many have contended that "possible litigation" may be discussed behind closed doors. I have contended to the contrary that any matter could be subject of "possible litigation" and that the language of §100(1)(d) must be construed narrowly. In sum, it appears that the executive sessions held for discussion of "legal matters" did not fall within any of the grounds for executive session enumerated in the Law and that they should have been held in full view of the public.

You also mentioned that executive sessions have been held to discuss "personnel matters." In this regard, I do not believe that a motion to discuss "personnel" without greater specificity is proper. The applicable exception for executive session regarding personnel is §100(1)(f) which states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

The Committee has consistently advised that the provision quoted above is intended largely to protect privacy and not to shield matters of policy under the guise of privacy. The legislation before the Governor if signed into law will tend to narrow the exception by stating that a public body could enter into executive session to discuss specific matters regrding "particular" persons or corporations as opposed to "any" person or corporation.

Your letter makes reference to the approval of minutes of executive session. In this regard, §101(2) of the Open Meetings Law requires that:

> "minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon..."

As I read §101(2), minutes of executive session must be compiled only when action is taken in executive session.

As such, public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

Secion 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

In addition, §87(3)(a) of the Freedom of Information Law (see attached) requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

In view of the foregoing, a school board may deliberate in executive session in accordance with §100(1) of the Open Meetings Law, but it may not in my opinion vote during an executive session, except when the vote pertains to a tenure proceeding.

With respect to the Freedom of Information Law, you have made several allegations regarding the procedural implementation of the Law and the subject matter list.

First, you stated that requests to inspect records are "never honored" before seven days have elapsed. In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the regulations promulgated by the Committee, which have the force and effect of Law, prescribe the time limits for response to a request (see attached). The cited provisions require that an agency must respond to a request within five business days of receipt of a request. It is emphasized that the five business day provision is in my view intended to be an outer limit for response, not a period during which members of the public must await a response. Further, a response to a request can take one of three forms. An agency may grant access to the records sought, deny access, or acknowledge receipt of the request within five business days. When a request is acknowledged, the agency has ten additional business days to grant or deny access. If no response is given in five business days, the request is considered a denial that may be appealed to the governing body of the District or whomever has been designated to determine appeals. In the event of a written denial of access, the reasons for the denial must be stated and the applicant must be apprised of his or her right to appeal and be given the name and address of the person to whom the appeal should be sent. If a record is denied constructively or by means of a written denial, the applicant has 30 days to appeal. The appeals person or body then has seven business days from the receipt of an appeal to grant access to the records or to fully explain in writing the reasons for further denial. In addition, copies of appeals and the ensuing determinations on appeals must be transmitted to the Committee pursuant to §89(4)(a) of the Freedom of Information Law.

With regard to your request for the subject matter list, I can only advise that a similar list was required to be compiled under the original Freedom of Information Law enacted in 1974 and that such a list should be in existence and available on an ongoing basis. Further, I do not believe that the compilation of a subject matter list creates an onerous burden on a school district, for the State Education Department provides retention and disposal schedules for records upon which a subject matter list may be based. Having reviewed several of the retention and disposal schedules, I believe that they are more detailed than a subject matter list must be.

In terms of a legal remedy, since §87(3)(c) of the Freedom of Information Law requires each agency to maintain a subject matter list, you could presumably initiate an Article 78 proceeding in the nature of mandamus to seek to compel the District to perform a duty that it is required to perform, i.e. to create a subject matter list.

Copies of this response as well as the Freedom of Information Law, the Open Meetings Law, regulations promulgated under the Freedom of Information Law by the Committee and model regulations designed to assist agencies in complying with the Freedom of Information Law will be sent to you and the School Board.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

cc: Honorable Warren Anderson
Honorable Mario M. Cuomo
Honorable Armand D'Amato
Honorable Stanley Fink
Honorable Norman Levy
New York State Office of General Services
Oceanside Union Free School District
Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-353

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 17, 1979

Robert H. Skigen, Esq.
Baum, Skigen & Lefkowitz
278 East Main Street
P.O. Box 648
Smithtown, New York 11787

Dear Mr. Skigen:

I have received your letter of July 5 regarding a series of activities conducted by the Zoning Board of Appeals of the Town of Smithtown.

The chronology of events and descriptive portions of your letter as you described them are in my view reflective of violations of both the Open Meetings Law, Public Officers Law, Article 7, and the Town Law, §267(1).

It is noted at the outset that a status of zoning boards of appeals with respect to the Open Meetings Law has been unclear and subject to conflicting interpretations. One of the problems that has arisen concerns the application of the exemption for quasi-judicial proceedings appearing in §103(1) of the Open Meetings Law. The cited provision states that the Open Meetings Law does not apply to quasi-judicial proceedings. Nevertheless, in the case of a town, the Committee has consistently advised that the exemption in question does not serve to close quasi-judicial proceedings of a town zoning board of appeals due to the direction provided by §267 of the Town Law. Subdivision (1) of the cited provision states in relevant part that all meetings of town zoning boards of appeal "shall be open to the public."

In view of the foregoing, although quasi-judicial proceedings of a town zoning board of appeals may be exempted from the Open Meetings Law, they are nonetheless required to be open under the provisions of §267(1) of the Town Law. This contention was recently bolstered by decisions rendered by the Supreme Court, Westchester County [see Matter of Katz v. Zoning Board of Appeals of the Town of Mamaroneck, NYLJ, June 12, 1979; affirmed on reargument, NYLJ, June 25, 1979].

Further, even if it could be argued that the exemption for quasi-judicial proceedings is applicable to a town zoning board of appeals, it is clear that not every function of a zoning board of appeals could be characterized as quasi-judicial. For example, in Orange County Publications v. Council of the City of Newburgh (60 AD 2d 409, aff'd NY 2d 947), it was determined that a city zoning board of appeals, which does not operate under provisions analagous to §267 of the Town Law, engaged in quasi-judicial proceedings only to the extent that it deliberates. The consideration of administrative matters, the making of decisions and voting fall outside the scope of the exemption for quasi-judicial proceedings.

Based upon the foregoing, I do not believe that a town zoning board of appeals may engage in closed or executive session under the provisions of §267 of the Town Law. As such, it would appear that the acts of excluding the public for the purpose of deliberating after the hearings held on February 13 and March 27 constituted violations of the Town Law.

Further, it would also appear that the visitation of the applicants' property following the hearings and executive session of March 27 constituted a "meeting" as defined by §97(1) of the Open Meetings Law as construed in Orange County Publications.

The decision made in executive session on May 8 in my opinion is reflective of a violation of the Town Law, §267(1), as well as the direction provided by Orange County Publications. To reiterate, even if the exemption for quasi-judicial proceedings would be applicable, it was held that the act of voting itself is not quasi-judicial and must be conducted in public.

With respect to your last inquiry concerning the lack of minutes or a transcript, I can only restate my view that the closed session should have been open. However, in the event that the provisions of the Open Meetings Law would be applicable on the ground that the Open Meetings Law is less restrictive with respect to public access than the Town Law concerning minutes [see Open Meetings Law, §105(2)], it is noted that minutes generally need not make reference to each remark or contention expressed at a meeting. Further, in the event that an executive session is appropriately held, minutes must be compiled only in situations in which action is taken behind closed doors. Therefore, if a public body

merely discusses in executive session, but takes no action, there need not be minutes.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Town Zoning Board of Appeals of
the Town of Smithtown

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1199
OML-AO-354

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 17, 1979

Mr. Rex R. Snider
[redacted]

Dear Mr. Snider:

I have received your letter of July 12 and thank you for your interest in compliance with the Freedom of Information Law and the Open Meetings Law.

Enclosed for your consideration are copies of both laws, regulations governing the procedural aspects of the Freedom of Information Law, a pamphlet entitled "The New Freedom of Information Law and How to Use It" and a bill to amend the Open Meetings Law that was signed yesterday by Governor Carey.

With respect to your comments, it appears that the Village of Corfu may have engaged in violations of the Open Meetings Law in several areas.

First, you wrote that during regular meetings, the Village Board of Trustees in some instances schedules special sessions, "in some instances executive sessions", to be held at a later date. You also indicated that notice is generally not given regarding the special sessions apart from announcements given at regular meetings.

In this regard, §99 of the Open Meetings Law requires that notice be given prior to all meetings, whether regularly scheduled or otherwise. When a meeting is scheduled at least a week in advance, notice must be given to the public and the news media at least seventy-two hours prior to the meeting. If a meeting, such as a special meeting, is scheduled less than a week in advance, notice must be given "to the extent practicable" at a reasonable time prior to the meeting. It is noted that the amendments to the Open Meetings Law signed by the Governor will require that every public body designate one or more conspicuous locations to post notice of all meetings when the amendments become effective on October 1.

Next, I would like to emphasize that the definition of "meeting", although vague as initially written, has been construed expansively by the courts, which have essentially held that any gathering of a quorum of a public body for the purpose of discussing public business is a "meeting" subject to the Law [see Orange County Publication v. Council of the City of Newburgh, 60 AD 2d 409 aff'd NY 2d 947 (1978)]. The courts specified that the Open Meetings Law is applicable whether or not there is an intent to take action and regardless of the manner in which a gathering is characterized.

The phrase "executive session" is defined as a portion of an open meeting during which the public may be excluded [§97(3)]. As such, it is clear that an executive session is not separate and distinct from a meeting but rather is a portion thereof. Further, §100(1) of the Law specifies the procedure for entry into executive session and limits the areas of discussion appropriate for executive session. In relevant part, §100(1) states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

The only subjects that may be discussed in executive session are those listed in paragraphs (a) through (h) of §100(1).

You indicated that executive sessions were held to discuss "the proposed budget, the proposed sewer law, proposes sewer rates, employee raises and benefits, and creation of jobs." Although some of the subject matter that you identified may have been properly discussed during executive session, it appears that several areas of discussion, including those relative to the proposed budget, sewer rates and the creation of jobs should have been discussed during open meetings.

Moreover, as you intimated, while a public body may generally vote during a properly convened executive session, any vote to appropriate public monies must be taken in public during an open meeting.

With respect to the Freedom of Information Law, §87 (1)(b)(iii) of the Law states that an agency may charge up to twenty-five cents per photocopy. As such, I believe that the fee of twenty-five cents established by the Village is proper. However, it is noted that the public may inspect accessible records at no charge.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

cc: Village Board of Trustees

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 355

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 23, 1979

Mr. Rodney C. Hensel
Editor
Salamanca Republican-Press
36-42 River Street
Salamanca, New York 14779

Dear Mr. Hensel:

I recently received your letter of July 16 and the news article attached to it. According to your letter and the article, the Common Council of the City of Salamanca and the representatives of the Seneca Nation Tribal Council held a joint "closed-door dinner meeting" to discuss tourism and industrial development. Your question is whether, under the circumstances described, the meeting should have been open.

As I wrote to you sometime ago, all of the case law and statutory law appears to hold that the Seneca Nation Council meetings are outside the scope of the Open Meetings Law. Very simply, in most instances, it appears that many of the laws of New York do not affect an Indian Nation or its council.

Nevertheless, in this case, a meeting was held between representatives of the Indian Nation and a public body, the Common Council of the City of Salamanca. As such, I believe that the gathering should have been open.

The Court of Appeals in Orange County Publications v. Council of the City of Newburgh (68 AD 2d 409, aff'd NY 2d 947) held that any gathering of a quorum of a public body for the purpose of discussing public business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. In the situation described, it is clear that a quorum of the Common Council was present for the purpose of discussing or con-

ducting public business. Consequently the gathering was in my opinion a meeting that should have been open to the public and preceded by compliance with the notice provisions appearing in §99 of the Open Meetings Law.

Moreover, in a similar situation in which a joint meeting was held by a school board and members of a city council, the Appellate Division, Third Department, held that the gathering was a "meeting" subject to the Open Meetings Law (Oneonta Star, Division of Ottaway Newspapers v. Board of Trustees of the Oneonta School District, 412 NYS 2d 927).

In view of the foregoing, I believe that the joint meeting between the Common Council and representatives of the Indian Nation was a "meeting" subject to the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-356

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 24, 1979

Mr. Frank Maresca
Secretary
Pawling Fire District
Board of Fire Commissioners
P.O. Box 464
Pawling, New York 12564

Dear Mr. Maresca:

Thank you for your interest in complying with the Open Meetings Law.

Your letter indicates that you are Secretary of the Board of Fire Commissioners of the Pawling Fire District. In conjunction with your duty to compile minutes of meetings, a citizen has expressed the opinion that it is mandatory that you read the minutes of a previous meeting aloud.

To the best of my knowledge, although you may have the duty to compile the minutes, there is no provision of which I am aware that requires you or the members or representatives of any board to read minutes aloud in a verbatim account.

The only situation that I can envision in which minutes must be read would involve direction provided in the by-laws of the District or by means of a resolution passed by the District requiring that the minutes be read aloud.

It is also noted that the minutes are accessible under the Freedom of Information Law and that any person may inspect or copy the minutes.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

RJF/kk

Robert J. Freeman
Executive Director

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS
OML-AO- 357

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 24, 1979

Ms. Elise Rosenblum
The Citizen Register
Ossining, New York 10562

Dear Ms. Rosenblum:

Thank you for your interest in compliance with the Open Meetings Law. Your inquiry concerns an article that you wrote in which reference is made to the application of Matter of Katz to village zoning boards of appeals. In addition, you have enclosed a letter addressed to you by Samuel Gilbert, Village Attorney, who wrote that in his opinion the Katz decision "merely holds that determinations must be held in public but that deliberations are clearly judicial in nature and can be held privately" (emphasis supplied by Mr. Gilbert).

Based upon the decision rendered on reargument in Matter of Katz that appeared in the New York Law Journal on June 25, 1979, I respectfully disagree with the opinion expressed by Mr. Gilbert.

In Katz, the court distinguished between requirements concerning meetings of town zoning boards of appeals and city zoning boards of appeals. While it may be true that zoning boards of appeals generally engage in quasi-judicial proceedings which are not subject to the Open Meetings Law [see Open Meetings Law, §103(1)], other provisions of law such as §267 of the Town Law nonetheless remain in effect. In the decision rendered on reargument, Justice Wood emphasized his cognizance of Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947. In Orange County Publications, it was held that to the extent that a city zoning board of appeals engages in quasi-judicial proceedings, i.e. deliberations, it would be exempted from the provisions of the Open Meetings Law. In distinguishing the situation of a city zoning board of appeals and a town zoning board of appeals, the court made specific reference to

provisions of the Town Law that direct that "[A]ll meetings of such board shall be open to the public" [Town Law, §267(1)]. The court found that in view of the clear direction provided by the Town Law, the exemption for quasi-judicial proceedings appearing in the Open Meetings Law is of no effect and that the meetings of town zoning boards of appeals, which include the deliberations as well as the making of determinations, are subject to the provisions of the Town Law and therefore must be open.

Although the Katz decision dealt only with town zoning boards of appeals, the applicable provision of the Village Law relative to the conduct of meetings of village zoning boards of appeals is the same as that contained in the Town Law. Section 7-712(1) of the Village Law states in relevant part that "[A]ll meetings of such board shall be open to the public." In view of the fact that the language of §267 of the Town Law and §7-712 of the Village Law insofar as they pertain to meetings of zoning boards of appeals are exactly the same, I believe that the applicable law with respect to the conduct of meeting of village zoning boards of appeals is the Village Law, not the more restrictive provisions of the Open Meetings Law. Further, due to the sameness of the language in the Village Law and the Town Law, the interpretation of the Village Law vis-a-vis the Open Meetings Law would in my view result in an interpretation analogous to that reached in Katz.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Village Zoning Board of Appeals
Samuel Gilbert, Village Attorney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-358

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 25, 1979

Ms. Cynthia Gagne
[redacted]

Dear Ms. Gagne:

Thank you for your letter of July 12 and your interest in compliance with the Open Meetings Law.

According to your letter, the Board of Education of the Fulton Consolidated School District held an "executive meeting" prior to an open meeting regarding the budget on June 30. You also wrote that there was no vote taken prior to the executive session nor was there any indication of the nature of the topic discussed. In addition, you wrote that Eugene Tracy, the President of the Board, stated that the executive meeting to which you made reference was not held in violation of any law and that "the school board could have executive meetings at anytime."

I disagree with Mr. Tracy's contentions.

First, although the definition of "meeting" is somewhat vague [see Open Meetings Law, §97(1)], it has been interpreted expansively by the courts. In Orange County Publications v. Council of the City of Newburgh, (60 AD 2d 409, aff'd NY 2d 947), the Court of Appeals, the State's highest court, held that any gathering of a quorum of a public body for the purpose of discussing public business is a "meeting" that falls within the framework of the Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. As such, work sessions and similar gatherings are "meetings" that must be convened open to the public and preceded by compliance with notice requirements described in §99 of the Law.

Second, §97(3) of the Law defines "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, an executive session is not separate and distinct from an open meeting but rather is a portion thereof.

Third, §100(1) of the Law prescribes a specific procedure for entry into executive session which reaffirms my earlier contention that an executive session is not separate from an open meeting. The cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the quoted provision, it is clear that a motion to enter into executive session must be made during an open meeting, that the motion must be carried by a majority vote of the total membership of a public body, and that subject matter intended to be discussed behind closed doors must be identified in a general manner.

Fourth, Mr. Tracy's statement that the School Board may enter into executive session at anytime is erroneous, for paragraphs (a) through (h) of §100(1) specify and limit the subjects that may appropriately be discussed in executive session. Therefore, a public body, such as a school board, cannot enter into executive session to discuss the subject of its choice; on the contrary, a public body is restricted to the subjects listed in the Law with respect to topics that may be discussed in executive session.

You asked finally what recourse there may be in order to correct the situation. Section 102 of the Law provides that an aggrieved person may seek injunctive relief. Stated differently, if a member of the public knows in advance that a violation of the Open Meetings Law is about to be committed, he or she may seek an injunction from a court that would preclude a public body from violating the Law. In addition,

the Law also states that if, for example, a public body takes action behind closed doors that should have been taken during an open meeting, a court has the authority "upon good cause shown" to make null and void the determinations made in violation of the Law. Lastly, the Law also gives a court discretionary authority to award attorney fees to the party that prevails in a judicial proceeding. Therefore, if you initiate a judicial proceeding against a public body and prevail, it is possible that your legal fees would be reimbursed. However, on the other hand, if the court believed that the proceeding was frivolous, it is also possible that attorneys fees might be assessed against a member of the public. It is noted that, to the best of my knowledge, attorney fees have never been assessed against a member of the public under the Open Meetings Law, but that attorneys fees have been awarded when a member of the public prevailed in a challenge initiated under the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Floyd Boynton
Vince Caravan
Judy Geitner
Ken Julian
Jean Ruta
Rosemary Sullivan
Eugene Tracy

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1209
OML-AO-359

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 26, 1979

Mr. Mike Meaney
The Daily Item
Port Chester, NY 10573

Dear Mr. Meaney:

I have received your letter of July 19 in which you have raised numerous questions regarding the powers of school boards in relation to the Open Meetings Law.

It is noted at the outset that the Open Meetings Law was recently amended. The revised statute, which will go into effect on October 1, will in my opinion solve or clarify several of the problems that have consistently arisen under the original statute. I will make reference to the provisions of the amended Law throughout the remainder of this opinion.

The first area of inquiry concerns "union grievances". You have asked when a school board may hold a closed session on a grievance. Section 97(3) of the Law defines "executive session" as a portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law specifies the procedure for entry into executive session and limits the subject matter that may be discussed in executive session.

Two of the grounds for executive session may have relevance under the circumstances that you described. Section 100(1)(e) states that a public body may enter into executive session to discuss "collective bargaining negotiations pursuant to article fourteen of the civil service law", which is commonly known as the Taylor Law. In my opinion, the quoted provision makes reference to the contractual negotiations in which public employee unions and government are involved. I do not believe that it includes grievances. However, §100(1)(f) of the amended Law will enable a public body to enter into executive session to discuss:

> "...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

In view of the foregoing, a public body will have the capacity to discuss the employment history of a particular individual behind closed doors, for example, as well as matters leading to the discipline, suspension, removal etc. of a particular individual. If a grievance is general in its terms in that it deals with such subjects as the ability to hold union meetings on school grounds or similar issues, I believe that none of the grounds for executive session could appropriately be cited.

In the same subject area, you have asked whether it is legal for a school board "to make a contract agreement to hear all grievances in executive session." In my opinion, a collective bargaining agreement or contract cannot legally include such a provision. As I mentioned earlier, §100(1) prescribes a procedure for entry into executive session. Specifically, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Thus it is clear that an executive session can be held only after having convened an open meeting. Further, the only subjects that may be discussed in executive session are those described in the ensuing paragraphs (a) through (h). In my view, a contractual provision cannot supersede a statute or restrict rights granted by a statute. Consequently, a collective bargaining agreement cannot in my opinion require that all grievances be heard in executive session.

You have also asked how school boards must report their decisions on a grievance and whether the minutes must include the nature of the grievance. It is important to point out that public bodies may generally act during a properly convened executive session. However, §105(2) of the Open Meetings Law states that less restrictive provisions of law than the Open Meetings Law are not superseded by the Open Meetings Law. In the case of a school board, §1708(3) of the Education Law has been judicially interpreted to require that action be taken during open meetings in all instances except a tenure proceeding held pursuant to §3020-a of the Education Law. Consequently, although a school board may in some instances deliberate with respect to a grievance behind closed doors, determinations reached with respect to the grievance must be made during open meetings. Further §101(1) of the Law directs that minutes include reference to all "motions, proposals, resolutions and any other matter formally voted upon". As such, it would appear that minutes must include reference to the nature of the grievance, and that if a grievance is submitted, a determination not to act or to drop charges should also be included in minutes.

The second area of inquiry concerns personnel matters. You have asked initially how specific decisions made by a board in closed sessions must be. Again, I would like to reiterate that decisions cannot be made by a school board behind closed doors except in the case of a tenure proceeding. Further, with respect to the example that you provided, I do not believe that a board can simply report that the "Smith matter" was approved. Minutes must in my opinion indicate the nature of action taken.

I would also like to point out that the direction provided by the Freedom of Information Law may be of significance. Although that statute provides that an agency may withhold records which if disclosed would result in an "unwarranted invasion of personal privacy" [§87(2)(b)], the courts have generally held that public employees require lesser protection of privacy than the public generally. In brief, the Committee has advised and the courts have upheld the notion that records that have a bearing upon the manner in which a public employee performs his or her official duties is accessible, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy. Therefore, if a public employee is reprimanded, the reprimand is available under

the Freedom of Information Law, even if a particular public employee might be identified [see e.g. Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 664 (Court of Claims, 1978)].

As I indicated earlier, §100(1)(f) of the Open Meetings Law will enable a public body to enter into executive session to discuss some "personnel" matters. However, the so-called "personnel" exception for executive session has been substantially narrowed by the amendments. The amendment to §100(1)(f) is based upon the proposal made by the Committee in its third annual report to the Legislature on the Open Meetings Law. In the report the Committee wrote that:

> "[M]any public bodies have entered into executive session to discuss matters which tangentially affect public employees. It is the Committee's contention that paragraph (f) is not intended to shield discussion regarding policy under the guise of privacy. Clear distinctions may be made between situations in which 'personnel' are discussed directly and indirectly. For example, when a municipal board considers the dismissal of public employees for budgetary reasons, the discussion should be public, for issues regarding policy, not the privacy of public employees, would be at issue. Conversely, when the same board considers the dismissal of a particular employee because that person has not performed his or her duties adequately, the discussion could properly be discussed in executive session, for it would deal with the privacy of a named individual."

The legislative solution offered by the Committee, that "any person or corporation" be modified to allude to a "particular person or corporation" has been incorporated into the amendments. Therefore, discussions of personnel under the amendments must pertain to a particular person, rather than policy matters that have an indirect or tangential bearing upon "personnel".

The next area of inquiry concerns the Freedom of Information Law. The first question is whether teacher evaluations are available under the Law. In my opinion, the evaluations are likely deniable. Relevant to the question is §87(2)(g), which states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

While statistical or factual data, instructions to staff that affect the public or agency policy or determinations found within intra-agency materials are available, evaluations would likely constitute expressions of opinion or advice that would be deniable.

The same provision, however, would grant access to the next group of records that you described, "administrative decisions disciplining an employee". Since an administrative decision to discipline a public employee is reflective of a final agency determination, it is accessible. Further, as noted previously, reprimands of public employees have been held to be available by the courts (see Farrell, supra).

With respect to civil service test results and the identities of those who may have taken civil service examinations, the civil service "eligible lists" are accessible. The eligible list includes the names and standings of persons who passed a particular civil service exam. However, a list of all who may have taken an exam is deniable, for it could be used it identify those who have failed an examination by means of comparing it with the eligible list. Under the privacy provisions of the Freedom of Information Law as well as rules promulgated by the State Civil Service Department, disclosure of the identities of those who have failed the examination would result in an unwarranted invasion of personal privacy and therefore may be denied. Again, however, an eligible list identifying passing candidates is accessible.

Your next question concerns the Open Meetings Law. You have asked whether there are instances during the budget-making process in which the board may enter into executive session, such as a discussion of changes in staffing levels that might lead to the elimination of particular positions. As noted earlier, §100(1)(f) of the Open Meetings Law, the so-called "personnel" exception for executive session, is in the Committee's view intended to protect personal privacy, not to shield matters of policy under the guise of privacy. As a general matter, I believe that most discussions concerning the budget must be held during an open meeting. Further, even if the discussion concerns the elimination of positions, such a discussion would deal with policy. Nevertheless, if the discussion concerns the employment history of a particular individual and whether or not that individual should be retained, such a matter would in my view be appropriate for executive session.

Lastly, you have asked whether "standing committees of two or three school board members" are covered by the Open Meetings Law. There is only one appellate court decision on the subject, Daily Gazette Co., Inc. v. North Colonie Board of Education (412 NYS 2d 494, ___ AD 2d ___). In that case, it was held that committees and subcommittees which have no power to take final action, but rather only the authority to advise, are not public bodies subject to the Open Meetings Law. In its report to the Legislature, the Committee recommended that the definition of "public body" [§97(2)] be amended in order that committees and subcommittees clearly be included in the definition. The amendments to the Law redefine "public body" to make specifice reference to committees, subcommittees or similar bodies of a public body such as a school board. Consequently, when the amendments to the Law take effect, the committees that you described will clearly be subject to the Open Meetings Law in all respects.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-360

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 31, 1979

Ms. Betty Hoffman
First Ward Alderman
City of North Tonawanda
North Tonawanda, New York 14120

Dear Ms. Hoffman:

Thank you for your letter of July 19 and your interest in complying with the Open Meetings Law. Your question is whether minutes should be taken at the Common Council's workshop meetings.

First, as you are likely aware, the state's highest court, the Court of Appeals, affirmed a lower court decision which held that work sessions and similar gatherings fall within the definition of "meeting" appearing in §97(1) of the Open Meetings Law (Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947). As such, "meeting" includes any gathering in which a quorum of a public body is present for the purpose of discussing public business whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. Consequently, it is clear that workshop sessions and similar gatherings fall within the framework of the Open Meetings Law. Therefore, the requirements in the Law relative to workshop sessions are exactly the same as those "formal" meetings during which there is an intent to take action.

Second, while the Open Meetings Law does not define "minutes", §101 of the Law describes the minimum requirements concerning the contents of minutes. Specifically, §101(1) of the Law states that:

> "[M]inutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Therefore, if, for example, proposals or resolutions, none of which might be acted upon at the workshop, are introduced, minutes must be compiled that make reference to such proposals or resolutions.

It is also noted that the amendments to the Open Meetings Law, which become effective on October 1, specify that minutes of open meetings be compiled and made available within two weeks of the meeting.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-361

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 31, 1979

Ms. Heidi A. Fuge
Director
Historical Society of
Saratoga Springs
P.O. Box 216
Saratoga Springs, New York 12866

Dear Ms. Fuge:

I have received your letter of July 19, in which you described the Historical Society of Saratoga Springs as a "non-profit organization chartered under 501(c)(3)". Your question is whether you are required to place a notice in a local newspaper at the end of the year stating that books are open for public inspection.

Since I have no expertise regarding the requirements of the Not-For-Profit Corporation Law, I contacted the Corporate Records Division of the Department of State on your behalf. I was informed that the reference to §501(c)(3) concerns the Internal Revenue Code and pertains to tax exempt organizations. According to the staff attorney at the Corporate Records Division, to the best of his knowledge, there is no provision under either New York or federal law that requires that such a notice regarding the public inspection of books be given.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1212
OML-AO-362

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 31, 1979

Mr. Robert Gagné
[redacted]

Dear Mr. Gagné:

As you are aware, I have received your most recent letter concerning the disclosure of records and proceedings before a city school district board of education, the New York State Education Department and the various divisions of human rights.

Your first question deals with rights of access to a calendar of upcoming or passed hearings before the agencies specified above regarding, for example, the revocation of licenses, breaches of ministerial duties, unprofessional conduct, and discrimination. In this regard, it is important to note that rights of access to records pertaining to members of the public may be different from rights of access to records concerning public employees. In the case of a revocation hearing, since a license essentially lets the world know that a particular individual is qualified to engage in a particular vocation, I believe that a calendar identifying the subject of a revocation hearing would be available. Similarly, since the courts have held that records relevant to the performance of the official duties of public employees are accessible on the ground that disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy, a calendar relative to hearings concerning public employees would also be available. However, as I mentioned to you during our telephone conversation, records concerning discrimination may likely be denied. Specifically, §297(8) of the Executive Law concerning the Human Rights Division states that:

> "[N]o officer, agent or employee of the division shall make public with respect to a particular person without his consent information from reports obtained by the division except as necessary to the conduct of a proceeding under this section."

The intent of the quoted provision appears to involve the protection of privacy. As such, I believe that a calendar relative to human rights proceedings may justifiably be withheld.

Your second question concerns rights of access to pleadings of upcoming or passed hearings. Rights of access depend to an extent on the forum in which the proceeding takes place and the contents of the records. For instance, if a proceeding is conducted in a court of law, virtually all records related to the proceeding are accessible under §255 of the Judiciary Law. In other non-judicial types of proceedings, persons other than the subject of the hearing may be identified by means of witness statements, for example. In such instances, I believe that records or portions thereof may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. Further, some proceedings are given specific consideration by statute. The Public Health Law contains provisions regarding the creation of a State Board for Professional Medical Conduct. In §230 of the Public Health Law, reference is made in subdivision (11) to a prohibition against discovery. The relationship between that prohibition and the Freedom of Information Law is to date unclear and is being litigated (see attached, Freedom of Information Law Advisory Opinion No. 1176).

Your third question is whether under the Open Meetings Law you or any person has the right to attend hearings held by the agencies specified earlier that concern charges against a teacher, trade school operator or an employer, for example. First, if the proceeding is conducted by a single hearing officer, the Open Meetings Law would not be applicable, for the Law covers only public bodies consisting of two or more members. Second, if the proceedings are "quasi-judicial" in nature, they would be exempt from the provisions of the Open Meetings Law pursuant to §103(1). Third, in a case in which the Open Meetings Law would be applicable, the subject matter could justifiably be discussed during an executive session. Section 100(1)(f) of the Open Meetings Law, which as amended will become effective on October 1, states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

As such, the topics you discribed may generally be discussed behind closed doors.

However, as I mentioned during our conversation, while a matter may be exempted from the Open Meetings Law, or a discussion may be held in executive session, there is no requirement that the discussions be held behind closed doors. Like the Freedom of Information Law, the Open Meetings Law is permissive; a public body may discuss certain matters behind closed doors, but it need not.

Lastly, your final question concerns fees for copies. I agree with your contention that if a court clerk maintains possession of records that are subject to copying at fifty cents or one dollar per page, the same records should be made available from an agency subject to the Freedom of Information Law, presumably at a lower rate. Further, it would be illogical to assert that records accessible from a court are deniable from an agency.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1214
OML-AO-363

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 1, 1979

Henry J. Logan, Esq.
Town Attorney
Town of Mt. Pleasant
One Town Hall Plaza
Valhalla, NY 10595

Dear Mr. Logan:

Thank you for your letter of July 20 and your interest in complying with the Freedom of Information and the Open Meetings Laws.

According to your letter, the clerks of the Town Planning and Zoning Boards, as well as the Town Clerk, take written notes at the meetings of their respective boards. Further, you have indicated that a tape recorder is also used to assist in preparing the minutes. In conjunction with the foregoing, you have raised several questions.

First, you have asked whether the written notes of the clerks are public documents. In a situation in which the secretary to the Board of Regents took written notes that were used to formulate the minutes, but which were separate and distinct from the minutes, it was held that the notes were accessible [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)]. In the Warder case the court made an in camera inspection and determined that the contents of the notes were reflective of factual data that was available under §87(2)(g)(i) of the Freedom of Information Law. Due to the similarities between Warder and the question that you raised, I believe that the notes in question are accessible.

Second, you have asked whether the notes are subject to public review before the minutes are compiled. In this regard, I direct your attention to §86(4) of the Freedom of Information Law, which defines "record" to include "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever..." Since

the notes are records subject to rights of access, they should be made available in accordance with the procedural requirements of the Freedom of Information Law. For example, as you are aware, §89(3) of the Law requires that an agency respond to a request by means of a grant of access, a denial of access or a written acknowledgment within five business days of its receipt of a request. Consequently, it is conceivable that the notes might be made available prior to the compilation of the minutes. In this regard, it is emphasized that the provision concerning minutes in §101 of the Open Meetings Law has been amended. I have enclosed copies of the bill to amend the Open Meetings Law and the composite version of the Law as it will appear when the amendments become effective on October 1. Section 101(3) of the amendments will require that minutes of open meetings be compiled and made available within two weeks of a meeting. It is understood that public bodies might not meet to approve minutes within two weeks of a meeting. As such, it is suggested that unapproved minutes be marked as "unapproved," "draft," or "non-final", for example. By so doing, the public has the ability to know generally what transpired at a meeting, but at the same time is given notice that the minutes are subject to change. In addition, the members of the public body are given a measure of protection.

Your third question concerns the length of time that notes or tape recordings must be kept. In this regard, the Education Department pursuant to §65-b of the Public Officers Law concerning the destruction of records of municipalities, has developed a series of retention and disposition schedules which determine the length of time that records must be kept prior to their disposal. If the notes or tape recordings, for example, have been designated in the schedules to be kept for a specific period of time, they cannot be destroyed prior to that time. Further, as a general rule, a municipality cannot destroy records without the consent of the Commissioner of Education. I believe that you may apply to the Commissioner of Education to destroy particular types of records on an ongoing basis to avoid the need for renewing requests to destroy.

Fourth, you have asked whether public bodies must compile minutes of their work sessions. While the Open Meetings Law does not define "minutes", §101 of the Law describes the minimum requirements concerning the contents of minutes. Specifically, §101(1) of the Law states that:

> "[M]inutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Therefore, if, for example, proposals or resolutions, none of which might be acted upon at the work session, are introduced, minutes must be compiled that make reference to such proposals or resolutions.

As you requested, I have enclosed a copy of the Freedom of Information Law, which as amended became effective on January 1, 1978.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO - 364

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 2, 1979

Ms. Patricia A. Pancoe
Asst. Corporation Counsel
City of Buffalo
Department of Law
City Hall
Buffalo, New York 14240

Dear Ms. Pancoe:

I have received your letter of July 25 which raises several questions relative to the Buffalo Charter Revision Commission in conjunction with the Open Meetings Law.

Your first question is whether §36(6)(f) of the Municipal Home Rule Law concerning charter revision commissions supersedes the provisions of the Open Meetings Law, thereby allowing such a commission to hold closed hearings. The cited provision states that:

> "[T]he commission shall conduct public hearings. It shall conduct such public hearings at such times and at such places within the city as it shall deem necessary. The commission shall also have power to conduct private hearings, take testimony, subpoena witnesses and require the production of books, papers and records."

In response to your questions, it is important to note that there may be a distinction between a "hearing" and a "meeting" as defined by §97(1) of the Open Meetings Law. Despite the vagueness of the definition of "meeting", as you are aware, the Court of Appeals affirmed an appellate court decision which held that any gathering of a quorum of a public body for the purpose of discussing public business is a "meeting" that falls within the framework of the Law (see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d, 409 aff'd 45 NY 2d 947). Further, both the statement

of legislative intent in the Open Meetings Law (§95) and the judicial decision to which reference was made directed that the Law is intended to open the deliberative process of public bodies to public view. As such, it is the deliberative process of public bodies that is at the heart of the Open Meetings Law.

A hearing, on the other hand, may in my opinion be viewed from a different perspective. For example, reference is made in §36(6)(f) to the authority to "take testimony, subpoena witnesses and require the production of books, papers and records." In such a context, it would appear that a hearing might be held for many reasons, including deliberation, i.e. to elicit testimony or obtain evidence regarding a commission's area of inquiry. When, however, the purpose of the gathering is to deliberate as a body and to discuss policy, it would not in my opinion constitute a hearing, but rather would be a "meeting" subject to the Open Meetings Law in all respects. As such, in view of the possible distinctions between a hearing and a meeting, I do not believe that §36 of the Municipal Home Rule Law supersedes or conflicts with the Open Meetings Law. Further, it is possible that a hearing may also constitute a "meeting", if, for example, a quorum of a public body is present for the purpose of eliciting comments and engaging in discussion relative to the comments.

The second question is whether the subcommittees of the Commission may hold meetings during which the public may be excluded. As you are aware, this Committee has long advised that committees, subcommittees and similar bodies fall within the definition of "public body" appearing in §97(2) of the Law. This stance is the result of the following analysis. The Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..."[§97(2)].

By separating the quoted definition into its elements, one can conclude that a subcommittee is a public body subject to the Law.

First, a subcommittee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although subcommittees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all such bodies act only by means of a statutory quorum.

Second, does a subcommittee "transact public business"? While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business". This opinion has been ratified by the Orange County Publications decision cited earlier.

Third, the subcommittees in question perform a governmental function for a public corporation, the City of Buffalo.

Fourth, the debate in the Assembly in 1976 regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of MFY Legal Services, 402 NYS 2d 510; Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

Despite this rationale, the Appellate Division, Third Department, in Daily Gazette Co., Inc. v. North Colonie Board of Education, 412 NYS 2d 494, ____ AD 2d ____, held that committees and subcommittees which have no capacity to take final action do not "transact public business" and therefore fall outside the scope of the definition of "public body". However,

recently the Governor signed legislation to amend the Open Meetings Law, Chapter 704 of the Laws of 1979, which will become effective October 1, 1979. One of the amendments to the Open Meetings Law is the specific inclusion of committees and subcommittees of a public body, such as a charter commission, within the definition of "public body". Although the amendments to the Law do not become effective until October 1, the Memorandum in Support of the legislation indicates that it was the initial intent of the Legislature to include committees and subcommittees within the scope of the Law. In relevant part, the memorandum described the amendment in question as:

> "[A]n expansion in the definition of public body to specify, as was intended and indeed so stated in the Assembly debate, the inclusion of committee or subcommittee or other similar body or a public body; and to substitute the work 'conduct' for 'transact' as a more precise description of those activities carried on at public meetings."

Consequently, I believe that the amendment to the definition of "public body" is intended to clarify the definition and essentially reverse the holding in Daily Gazette, supra. In view of the clear intent, I believe that the Daily Gazette case, although it may be the only Appellate Division decision on the issue, is erroneous. In view of the foregoing, it is my contention that committees and subcommittees have been and are now subject to the Open Meetings Law.

Your third question is whether the notice provisions of the Open Meetings Law apply to "meetings of the entire Charter Revision Commission and also to meetings of the Commission's subcommittees." Section 99 of the Law requires that public bodies provide notice of the time and place of meetings prior to every meeting. Since the Charter Revision Commission is a public body, it is required to give effect of §99 of the Open Meetings Law. Similarly, if my contention that committees and subcommittees of the Commission are also public bodies can be considered accurate, those bodies must also comply with the notice provisions in §99 of the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

RJF/kk

Robert J. Freeman
Executive Director

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-365

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 6, 1979

Mr. Robert F. Reninger
[redacted]

Dear Mr. Reninger:

I have received your letter of July 22 concerning your exclusion from a meeting of the Greenburgh School District's Committee on the Handicapped. According to your letter and the minutes attached to your letter, the meeting concerned the educational progress of your child. Your question is whether the Committee on the Handicapped acted in violation of the Open Meetings Law by excluding you from the meeting in order to deliberate.

In my opinion, although the Open Meetings Law was not violated, provisions of the Education Law and the regulations promulgated by the United States Department of Health Education and Welfare (HEW) were likely violated.

As I wrote in my response to you of May 29, §103(3) of the Open Meetings Law provides that a discussion of "any matter made confidential by federal or state law" is exempt from the Open Meetings Law and falls outside its scope. Since records relative to handicapped children are confidential pursuant to the Education of the Handicapped Act (Public Law 94-142), any discussion of a handicapped child by means of records related to the child would be confidential and therefore outside the scope of the Open Meetings Law. I believe that this interpretation would be accurate even though you as a parent have the right to be present during discussions regarding your child as well as the right to review records pertaining to your child.

Despite the exemption from the Open Meetings Law, as noted earlier, §4402(3)(c) of the New York Education Law directs that a committee on the handicapped give notice to parents when evaluations of a child's placement will be discussed, and in addition, such a committee is required to provide the parents with the opportunity to address the the committee. Further, §200.4(f)(2) of the regulations promulgated by the Commissioner of Education implicitly require that a parent be permitted to attend conferences whenever possible. As such, I believe that there is an intent in New York Law to encourage parents to participate in the meetings and deliberations of a committee on the handicapped.

Moreover, as a condition precedent to the receipt of funds under the Education of the Handicapped Act, states and school districts that receive funding through the Act are required to comply with the regulations adopted by HEW. In this regard, §121a.345 of the HEW regulations, entitled "parent participation" states that:

> "(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:
>
> (1) Notifying parents of the meetings early enough to insure that they will have an opportunity to attend; and
>
> (2) Scheduling the meeting at a mutually agreed on time and place.
>
> (b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.
>
> (c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.
>
> (d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program" (emphasis added).

In view of the direction given in the regulations quoted above, it is clear that a public agency, such as the Committee on the Handicapped, must make efforts to ensure that parents may attend meetings and that parents are fully aware of any discussions and deliberations that transpire at the meetings.

In sum, your exclusion from the meeting in my view conflicts with the direction provided by the New York Education Law and regulations, as well as the HEW regulations.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Committee on the Handicapped

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 366

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 7, 1979

Ms. Kelly Davis
[redacted]

Dear Ms. Davis:

Thank you for your letter of August 5. As requested, enclosed are copies of the Freedom of Information Law and the Open Meetings Law. In addition, since the Governor recently signed a bill to amend the Open Meetings Law which will become effective October 1, I have also enclosed a composite version of the revised Open Meetings Law as it will appear on October 1.

Your question is whether the public can be excluded from a discussion of the budget at a regularly scheduled meeting of a public body.

As a general matter, I believe that discussions regarding the budget must be conducted during open meetings in full view of the public.

The Open Meetings Law provides that public bodies may hold closed or executive sessions only to discuss subjects specified in the Law as appropriate for executive session [see §100(1)(a) through (h)]. In my view, none of the grounds for executive session could properly be cited to close a discussion concerning the budget, particularly in view of the amendments to the Law.

It has been argued that the "personnel" exception permits closed sessions to consider the budget, which may include discussion of layoffs, for example. The ground that has been cited is §100(1)(f), which states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

The Committee, however, has consistently advised that the quoted provision is largely intended to protect privacy, not to shield matters of policy under the guise of privacy. Consequently, while a discussion of the budget might indirectly or tangentially relate to "personnel", such a discussion would deal essentially with policy.

Moreover, §100(1)(f) of the amended Law bolsters the Committee's contention, for it will permit a public body to enter into executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

In view of the foregoing, I reiterate my contention that the discussion of a budget must generally be held during an open meeting.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO- 367

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 15, 1979

Mr. Paul Lester
News Director
WDLC
Port Jervis Broadcasting Co., Inc.
Neversink Drive
Port Jervis, New York 12771

Dear Mr. Lester:

I have received your letter of August 10. Your inquiry concerns the use of tape recorders at meetings of public bodies.

Specifically, your letter indicates that you have been informed by a member of the Town Board of the Town of Lumberland "that use of tape recorders by media reporters is prohibited because, in her words, we can 'edit' the tape before our newscasts." However, you have further indicated that it is "standard procedure" for the Town Clerk to employ a tape recorder to obtain a record of the entire proceedings of such meetings. In addition, you have stated that the Town Clerk cited an opinion of the Comptroller (#74-1019), which in hew view permits a public body to enable its clerk to record its proceedings but concurrently prohibits the use of tape recorders by the general public.

Under the circumstances, it is my opinion that you, as a member of the news media, and any members of the public have the right to use a tape recorder at the meetings held by the Town Board of the Town of Lumberland.

It is emphasized that the Open Meetings Law is silent with respect to the use of tape recorders. Further, there is but one judicial decision that has been rendered on the subject. In Davidson v. Common Council (244 NYS 2d 358), which was decided in 1963, it was held that a public body

has the authority to adopt reasonable rules to govern its own proceedings and that such rules could prohibit the use of tape recorders at meetings. The decision was based upon a successful argument that the presence of a tape recorder would detract from the deliberative process. In 1963 the decision may have been correct, for tape recorders were large and bulky machines that were obvious. In 1979, however, tape recorders are generally small and inconspicuous. Since their presence could hardly detract from the deliberative process, a general rule prohibiting the use of tape recorders would today in my opinion be considered unreasonable.

Moreover, it is clear that the Davidson decision was based solely upon the notion that the presence of a tape recorder would detract from the deliberative process. In this instance, the Town Clerk herself uses a tape recorder. If the use of that tape recorder does not detract from the deliberative process, presumably the use of other tape recorders would not detract from the deliberative process either.

The argument that members of the public or news media might "edit" a tape recording in my opinion lacks merit as a basis for the prohibition of the use of tape recorders. If, for example, a person took copious notes or a stenographer prepared a transcript of the proceedings, portions of such documentation could also be edited. Further, portions of records which may be voluminous are often quoted or cited in part. Although such activity might be misleading in some instances, that factor could not in my view constitute a sufficient ground for denial of access under the Freedom of Information Law. Similarly, while a tape recording might be edited or broadcast in part, the fear of editing would not in my opinion create a sufficient ground for prohibiting the use of tape recorders.

Lastly, with respect to the opinion of the Comptroller cited by the Town Clerk, I contacted the Office of Counsel to the Comptroller in order to gain additional information relative to the opinion. A staff attorney was gracious enough to read the entire opinion, which consists of one paragraph, to me. It is clear that the opinion essentially reiterates the holding in the Davidson decision cited earlier. Based upon Davidson, the opinion advised that a public body may prohibit the use of tape recorders at its meetings when the presence of the tape recorder would detract from the deliberative process. It made no reference to the use of a tape recorder by a representative of the public body itself. Consequently, I believe that the Town Clerk's interpretation of the Comptroller's opinion cited is erroneous.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Paul Kean, Town Supervisor
Genevieve Thiele, Town Clerk
Carl Goldstein, Attorney
Marion Swope

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-368

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 16, 1979

Ms. Shirley Zeller
Town Clerk
Town of Deerpark
Office of the Town Clerk
Drawer A
Huguenot, New York 12746

Dear Ms. Zeller:

I have received your letter of August 9 and appreciate your interest in complying with the Open Meetings Law. Your questions concern the activities of a town zoning board of appeals under the Open Meetings Law.

As a general matter, the Open Meetings Law provides that public bodies may engage in private discussions in two instances.

First, a public body may enter into executive session in accordance with the provision of §100 of the Open Meetings Law. The cited provision specifies the procedure for entry into executive session and limits the subject matter that may be discussed in executive session. In relevant part, subdivision (1) of §100 states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

As such, to enter into executive session, a motion must be made during an open meeting that is carried by a majority vote of the total membership of a public body in which the subject matter intended to be discussed in executive session is identified in general fashion. Thus it is clear that an executive session is not separate from an open meeting, but rather is a portion thereof.

The second provision under which public bodies may engage in private discussions is §103 of the Law. That section provides that three areas of discussion are exempt from the provisions of the Open Meetings Law. Stated differently, when a public body discusses a matter pursuant to any of the three areas, a meeting need not be convened open to the public, nor would a public body be required to follow the procedure for entry into executive session described earlier.

Relevant to your inquiry is §103(3), which provides that discussions of "any matter made confidential by federal or state law" is exempt from the Open Meetings Law. To the extent that a municipal attorney engages in an attorney-client relationship with a client, in this case a zoning board of appeals, such discussions are privileged under §4503 of the Civil Practice Law and Rules. Therefore, to the extent that the attorney-client privilege is applicable, discussions held within the scope of the privilege are exempt from the Open Meetings Law.

Consequently, with respect to your first question, I believe that a zoning board of appeals may discuss with its attorney, in a private session, whether the board has jurisdiction to entertain a particular application. While such a discussion would not fall within any of the grounds for executive session enumerated in §100(1), it would likely be subject to the attorney-client privilege and therefore would be exempt from the Law under §103(3).

Your second question is whether a public hearing must be held by a board to determine whether or not it has jurisdiction to determine an application. Since I have no expertise with respect to the question, I contacted the Office of Legal Services of the Division of Community Affairs at the Department of State on your behalf. I was informed by one of its staff attorneys that a public hearing would be unnecessary under the circumstances that you described, for such decision concerning jurisdiction would constitute a ministerial act.

The third question must be answered in a manner analogous to the response given with respect to your first question. In general, when a municipal attorney advises his client, a municipal board, in his capacity as an attorney, such discussions would in my opinion be subject to the attorney-client privilege and therefore exempt from the Open Meetings Law.

Your final question is whether executive sessions must be held in accordance with the provisions of the Open Meetings Law, notwithstanding the direction provided by §3.5(1) of the Rules and Procedures of the Board. The cited provision states that:

> "[T]he Board may meet in executive session to deliberate on matters before the board. However, any official action taken by the Board shall be at a meeting open to the public. Executive meetings may immediately precede the opening or follow the closing of regulations meetings or hearings."

In my opinion, the provision quoted above is invalid.

First, §105(1) of the Open Meetings Law provides that:

> "[A]ny provision of general, special or local law, ordinance, or rule or regulations affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby."

Since the quoted provision is more restrictive that the Open Meetings Law, it is in my opinion superseded to that extent. Second, as discussed previously, the subject matter that may appropriately be discussed in executive session is limited to those matters enumerated in paragraphs (a) through (h) of §100(1) of the Law. Therefore, a public body, including a zoning board of appeals, cannot discuss the subject of its choice during executive sessions. Third, the state's highest court has held that any convening of a quorum of a public

body for the purpose of discussing public business is a "meeting" subject to the Law in all respects [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 49 NY 2d 947]. Consequently, a public body is precluded from holding an executive session prior to a meeting. Further, as noted earlier, an executive session is a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §97(3)]. It is emphasized, however, that the Orange County Publications decision, supra, would not preclude the holding of a private discussion between a municipal board and its attorney when such a discussion is exempt from the Law pursuant to the attorney-client privilege.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-369

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 22, 1979

Ms. Helene M. Pelicone
[redacted]

Dear Ms. Pelicone:

I have received your letter of August 16 as well as the resolution appended to it.

According to your letter and the resolution, the Town Board of the Town of Galway enacted a resolution on August 14 prohibiting "the recording of any portion of Town Board meetings by mechanical electronic recording machines..." You have indicated that prior to the resolution, tape recorders had been used on an ongoing basis to the benefit of many. For example, you stated that many members of the public who could not attend Town Board meetings due to job schedules listened to tapes, and that tape recordings are often used to assist those with physical impairments, such as hearing disabilities. In addition, you wrote that the Supervisor of the Town also acts as a member of the Saratoga County Board of Supervisors, which has authorized the use of tape recorders at its meetings. In view of the foregoing, you have asked for an opinion regarding the legality of the resolution and Supervisor Mattice's acceptance of the use of tape recorders at meetings of the County Board of Supervisors, but a rejection of their use at Town Board meetings.

It is noted at the outset that both the Freedom of Information Law and the Open Meetings Law are silent with respect to the use of tape recorders. Further, there is but one judicial decision that has been rendered on the subject. In Davidson v. Common Council (244 NYS 2d 358), which was decided in 1963, it was held that a public body has the authority to adopt reasonable rules to govern its

own proceedings and that such rules could prohibit the use of tape recorders at meetings. The decision was based upon a successful argument that the presence of a tape recorder would detract from the deliberative process. From my perspective, in 1963 the decision may have been correct, for tape recorders were large and bulky machines that were obvious, sometimes noisy and required the use of electrical outlets. In 1979, however, tape recorders are generally small, inconspicuous and battery-powered. Since their presence could hardly detract from the deliberative process, a general rule prohibiting the use of tape recorders would today in my opinion be considered unreasonable.

In neither your letter nor our telephone conversation did you indicate that the Town Board offered any specific rationale for its determination to prohibit the use of tape recorders. In my view, if it could be demonstrated that the use of a tape recorder or a camera, for example, would indeed detract from the deliberative process of a public body, I believe that a rule prohibiting the use of such devices when disruptive would be reasonable. However, due to advances in technology and the lack of a stated ground for prohibiting the use of tape recorders, the resolution in my opinion would be found by a court to be unreasonable today, particularly if you can demonstrate that tape recorders employed are "small, modern, quiet devices", as you characterized them in your letter.

Further, assuming that similar small, quiet and modern tape recorders are used at the meetings of the County Board of Supervisors, presumably their effect on those proceedings would be exactly the same as their effect upon the proceedings of the Town Board. Based upon that reasoning, if the County Board of Supervisors has found that the presence of tape recorders does not detract from its deliberative process, it follows that use of the same devices could not be found to disrupt the proceedings of the Town Board.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1235
OML-AO-370

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 24, 1979

Mr. Robert F. Tomeny
Editor
The Scotchman Star-News
P.O. Box 393
North Syracuse, NY 13212

Dear Mr. Tomeny:

Thank you for your letter of August 20 and your interest in compliance with the Open Meetings Law.

First, you have asked under what circumstances a public body such as a board of education can call and conduct an executive session. In this regard, enclosed are copies of the Open Meetings Law as originally enacted and the Law as amended as it will appear on October 1. In both instances, the procedure for entry into executive session and the subject matter that may appropriately be discussed in executive session are found in §100(1)(a) through (h) of the Law. The eight subjects enumerated in the cited provision represent the only circumstances in which a public body may enter into executive session.

Second, you have asked whether official action may be taken during an executive session and, if so, under what circumstances. Although the Open Meetings Law generally permits public bodies to vote during a properly convened executive session, §100(1) of the Law requires that any vote taken to appropriate public monies be conducted during an open meeting. In addition, I believe that the Education Law precludes school boards from voting in executive session, except in conjunction with §3020-a of the Education Law concerning tenure.

Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

It is also noted that §87(3) of the Freedom of Information Law (see attached) requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

The third question concerns minutes of executive sessions and your experience that minutes of executive sessions had neither been required nor made available to the public in your area. Section 101 of the Open Meetings Law describes in subdivision (1) the minimum requirements regarding the contents of minutes of open meetings. Subdivision (2) currently states that minutes of executive sessions must be taken with respect to any action that is taken by formal vote during an executive session. However, the provision also currently states that the minutes of executive session "shall" not include any matter that is not required to be made available under the Freedom of Information Law. The amendments to the Law make one change in this respect. Since the Freedom of Information Law provides that an agency may, but need not, deny access to certain records, similarly, minutes of executive session under the amended Law may, but need not, include information that is deniable under the Freedom of Information Law. Further, as noted earlier, school boards in most cases need not compile minutes of executive session, for they have no authority to take action during executive session. However, other public bodies which have the authority to take action behind closed doors must record such action in the form of minutes of an executive session in accordance with §101(2).

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1242
OML-AO-371

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 17, 1979

James T. O'Reilly, Esq.
[redacted]

Dear Jim:

Please accept my apologies for the late response. I recently returned from vacation.

Your question concerns the status of panels known as "IRB's" (Institutional Review Boards) created pursuant to federal regulations by state hospital administrators. In my opinion, an IRB created by a state hospital administrator is a public body subject to the Open Meetings Law.

Reference was made in your letter to the Committee's proposed redefinition of "public body", which would include advisory bodies, committees and subcommittees that have no power to take final action, but merely recommend to a governing body or an executive, for example. While the specific language suggested was not enacted, the definition of "public body" was amended to include committees, subcommittees and similar groups. The new definition of "public body" includes:

> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Please note that the original definition applied to entities that "transacted" public business; the amendment includes bodies that "conduct" public business. Therefore it is clear that entities consisting of two or more that act collectively are subject to the Law, even though they may have no capacity to take final action.

Further, although the last clause of the amended definition makes reference to committees, subcommittees or other similar bodies "of such public body", the fact that an IRB may be created by a hospital administrator rather than by a governing body does not in my view remove an IRB from the coverage of the Law. In addition to components of governing bodies or other entities created by public bodies covered by the amendments, case law has held that an advisory body created by an executive is also subject to the Open Meetings Law [see MFY Legal Services v. Toia, 402 NYS 2d 510 (1978)].

A similar finding can be reached by means of breaking the definition of "public body" into its elements. An IRB is an entity consisting of more than two members. As such, it is required to act by means of a "quorum" under §41 of the General Construction Law (definition appears in full on page 4 of the report to the Legislature, February 27, 1979). It conducts public business and performs a governmental function for an agency of state government. As such, an IRB acting within or created by state or municipal government is a public body subject to the Open Meetings Law. It is noted that §56.81 of the regulations describes quorum requirements that differ from those appearing in §41 of the General Construction Law. Despite the distinction, it is clear that IRB is required to act by means of a quorum.

The second question is whether minutes of a meeting of an IRB created by a state institution are accessible under the New York Freedom of Information Law. In this regard, as you are aware, §86(4) of the Freedom of Information Law defines "record" broadly to include an information "in any physical form whatsoever" in possession of an agency. Consequently, minutes are clearly subject to rights of access. Whether the minutes would be accessible in toto or in part would depend upon their contents. Section 87(2) of the Law requires that all records be made available, except those records or portions thereof that fall within one or more grounds for denial enumerated in paragraphs (a) through (h) of the cited provision.

Therefore, if, for example, names or other identifying details appear in minutes or similar documentation, such information could likely be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy [§87(2)(b)]. It is also possible that information information in possession of an IRB might constitute a trade secret that would be deniable under §87(2)(d). However, as a general presumption, minutes of the meetings should in my view be made available.

I have enclosed for your consideration copies of the Open Meetings Law as amended, a memorandum sent to public bodies throughout the state in which the amendments are explained, and my comments to the Counsel to the Governor regarding the bill.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Hope all is well with you. Keep in touch.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1277
OML-AO-372

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 18, 1979

Ms. Emily March
[redacted]

Dear Ms. March:

I have received your letter concerning your inability to gain access to minutes of a meeting of the Port Jervis Housing Authority.

Your letter indicates that approximately ten days after a meeting, you requested a copy of minutes and were informed that the minutes would be mailed to you. However, as of the date of your letter, September 5, you had not received the minutes.

In my opinion, to the extent that minutes exist, they must be made available to you. Further, §89(3) of the Freedom of Information Law requires that an agency respond to a request within five business days of its receipt. The response to a request can grant access, deny access or acknowledge receipt of a request. If the receipt of a request is acknowledged, the agency then has ten additional business days to decide to grant or deny access. If no response is given within five business days of receipt of a request or within ten business days from the date of an acknowledgment, the request is considered constructively denied. In such a case, you may appeal the denial to the head or governing body of an agency, which has seven business days to grant access to the records or fully explain the reasons for further denial in writing. In addition, the person or body designated to determine appeals is required to transmit to this Committee copies of appeals and the determinations that ensue.

It is also noted that amendments to the Open Meetings Law that will become effective on October 1, will require that minutes of open meetings be compiled and made available within two weeks of the date of the meeting.

Lastly, your letter indicates your belief that the Authority has broken the law, and you have questioned why the Authority or its membership has not been "fined as the law states". In this regard, please be advised that the Freedom of Information Law does not contain any provisions regarding the fining of public officials who may have failed to comply with its provisions.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Port Jervis Housing Authority

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-373

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 18, 1979

Mr. Joseph A. Longo
[redacted]

Dear Mr. Longo:

I have received your letter of September 12 in which you requested an opinion regarding the right of a member of a town board to use a tape recorder during open and closed meetings. You indicated that at a recent meeting of the Board, the Supervisor refused permission to tape record and, according to your letter, stated that the use of a tape recorder was illegal.

In my opinion, a general rule prohibiting the use of tape recorders at open meetings is invalid.

Until recently, there was but one judicial determination concerning the use of tape recorders at open meetings. In Davidson v. Common Council of the City of White Plains (40 Misc. 2d 1053, 244 NYS 2d 285), the court upheld a prohibition of the use of tape recorders based upon the following reasoning. First, the court found that a public body has the ability to adopt reasonable rules to govern its own proceedings. Second, the court agreed with the contention of the Common Council that the presence of a tape recorder would detract from the deliberative process. Therefore, third, the court found that a rule prohibiting the use of tape recorders was reasonable due to its disruptive effect on the proceedings.

Nevertheless, the Davidson decision, which was rendered in 1963, has apparently been effectively reversed. In People v. Ystueta (418 NYS 2d 508), which was decided on June 5, 1979, the court recognized technological advances that have been made since Davidson and found that the use of a small cassette recorder would not detract from the deliberative process. In addition, the court found that the clear declaration of legislative intent in the Open Meetings Law announces a policy of openness, which precludes the adoption of a general rule prohibiting the use of tape recorders.

In view of the foregoing, a public body cannot in my opinion adopt a general rule that prohibits the use of tape recorders at open meetings.

As yet, there is no case law concerning the ability to tape record executive sessions. However, in view of the fact that the vehicle of the executive session is intended to permit private discussion, it is possible that a court would conclude that a public body may properly adopt a rule prohibiting the use of tape recorders at executive sessions. However, it is emphasized that such a finding is conjectural on my part.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Town Board of Geddes

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1244
OML-AO-374

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 18, 1979

Ms. Doris Wenger
[redacted]

Dear Ms. Wenger:

I have received your letter and the correspondence appended to it relative to denials of access by the Islip Union Free School District #2.

First, one of your applications for public access included a request for a note register. In response, the application form completed by the District indicates that the note register is not maintained by the School District. As a general matter, if an agency does not maintain a record, it is not obliged to obtain the record in order to provide access. Nevertheless, §170.2(g) of the regulations promulgated by the Commissioner of Education (8 NYCRR) requires the Board of Education

> "[T]o provide the treasurer with a note register in which he shall record the dates of the resolutions authorizing notes; the types of notes; the dates on which notes are drawn; the numbers of the notes; the banks from which the money was borrowed; the amounts of the notes; the rates of interest, the dates of maturity; the dates the notes were paid, and, the amounts of principal and interest paid."

In view of the provision quoted above, it would appear that a failure to maintain the note register that you requested would itself constitute a violation of law. Further, it is equally clear that the information contained within a note register would be accessible under the Freedom of Information Law, for each of the items contained within the register would constitute "statistical or factual tabulations or data", which are available under §87(2)(g)(i) of the Freedom of Information Law.

The second item in your letter alleges that the administrators of the District have a verbal contract, and that you have been unable to locate minutes indicating the duties or salaries of the administrators. Assuming that the Board of Education determined the parameters of the duties of the administrators and that motions were made and votes taken concerning administrators' salaries, such information would be required to be included in minutes under §101 of the Open Meetings Law. In the alternative, assuming the information does not appear in the minutes, §87(3)(b) of the Freedom of Information Law requires that each agency compile a payroll record that includes the name, public office address, title and salary of every officer or employee of the agency. In addition, if the payroll record has not been compiled, such failure constitutes a violation of the Freedom of Information Law.

Your third area of inquiry concerns a request for information regarding the District's Capital Indebtedness Account. In response to your inquiry for the information, you were told that records relative to the Account are not maintained by the District. In all honesty, I am unfamiliar with the recordkeeping requirements of a school district. Consequently, I have no knowledge of whether a school district is indeed required to maintain records concerning a capital indebtedness account. Nevertheless, in order to provide an auditor, such as Sheehan & Company, with sufficient information to perform an audit, it would appear that records concerning a capital indebtedness account would of necessity be transmitted by a school district to an auditor. If such records emanate from a school district, it would seem logical to conclude that a district maintain such records. Further, if the District does indeed maintain such records, they would in my view also be available under the section quoted earlier, §87(2)(g)(i).

Lastly, as you are aware, §89(3) of the Freedom of Information Law requires an agency, on request, to "certify that it does not have possession" of a record sought "or that such record cannot be found after diligent search." As such, it is suggested that you seek a certification from the District in which you are interest are not maintained by the District.

In addition, the Freedom of Information Law and the regulations provide specific time limits for a response to a request. In general, an agency is required to respond to a request within five business days of the receipt of requests. Further, the provision of the Law cited in the preceding paragraph requires agencies to make copies of available records on request when a determination to grant access has been made.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Islip Union Free School District #2

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-375

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 18, 1979

John J. Warner, Esq.
Assistant County Attorney
County of Schenectady
Office of the County Attorney
County Office Building
620 State Street
Schenectady, New York 12305

Dear Mr. Warner:

I have received your letter of September 12 and thank you for your interest in complying with the Open Meetings Law. Your questions concern requirements in the amended Open Meetings Law regarding the coverage of committees and subcommittees as well as minutes of the meetings of those bodies.

Your first question is whether the amendments "impose a duty upon the Board of Representatives to record and transcribe all committee and subcommittee meetings to be held on or after October 1, 1979..." In order to respond appropriately, it is important to review the requirements concerning minutes that appear in §101 of the Open Meetings Law. Specifically, the first two subdivisions of §101 distinguish between minutes of open meetings and minutes of executive sessions as follows:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not

> include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

Based upon the foregoing, it is clear that minutes need not consist of a verbatim transcript of the discussions that transpire at a meeting. Similarly, there is no requirement that meetings be tape recorded. On the contrary, the provisions relating to minutes of open meetings merely require that the minutes consist of a record or summary of "motions, proposals, resolutions and any other matter voted upon and the vote thereon". Minutes of executive sessions need only consist of "a record or summary of the final determination..." of action taken "and the date and vote thereon". Therefore, it is reiterated that the requirements concerning the compilation of minutes are minimal and that it is unnecessary to employ a stenographer to create a verbatim transcript or to employ a tape recorder in order to maintain a verbatim account of deliberations.

As you indicated, minutes of open meetings must be compiled and made available within two weeks of an open meeting. Although your second question refers to minutes as "transcribed", a transcript is not required to be made. Additionally, in recognition of the fact that many public bodies might not meet within two weeks of meetings to consider or approve minutes, the Committee has recommended that unapproved minutes be made available within two weeks as §101(3) requires, but that such minutes may be marked as "unapproved", "draft", "non-final", or "subject to change", for example. By so doing, the public has the ability to learn generally what transpired at a meeting, but it is concurrently given notice that the minutes are subject to change. Also, when unapproved minutes are so marked, members of a public body are given a measure of protection.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Eugene J. Blesser

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-376

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 18, 1979

Mr. Ron Patafio
News Editor
The Reporter Dispatch
One Gannett Drive
White Plains, NY 10604

Dear Mr. Patafio:

I have received your letter of August 21. As I explained to Mr. Lashley when we discussed the subject matter of your letter, I have been on vacation. Consequently, I apologize for the delay in response and any possible inconvenience.

Your inquiry concerns possible violations of the Open Meetings Law by the Mt. Kisco Village Board of Trustees at a meeting held on August 20.

According to your letter, the Board called an executive session following its regular meeting to discuss three items, including "a personnel issue having to do with the vacant village assessor's post, pending litigation against the village by the Teamster's Union and a possible lawsuit against a federal agency by the village." You also indicated that the discussion of a possible lawsuit against a federal agency resulted in direction given to the Village Attorney, Anthony Pieragostini, to "find a special counsel to assess the village's strength in such a possible suit."

In fairness, I discussed the issues raised with Mr. Pieragostini. In my opinion, the presence or absence of violations of the Open Meetings Law hinges upon the specific nature of discussions in which the Board of Trustees was involved.

The first item in executive session concerned the vacant position of village assessor. In this regard, if the Board of Trustees engaged in a general discussion regarding the vacancy or the qualifications of any successor to the position, the discussion should in my opinion have been open. However, if a discussion concerned particular individuals who may have been considered for the position, I believe that an executive session could properly have been convened under §100(1)(f) of the Open Meetings Law. Similarly, the propriety of closed door consideration of the retention of a special counsel would be determined on a like basis. The cited provision states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

It is noted that the quoted provision will be narrowed by means of amendments to the Open Meetings Law that go into effect on October 1. The new language will make it clear that §100(1)(f) may appropriately be cited when the issues concern "particular" individuals or corporations, and the reference in the existing Law to "any person or corporation" will be altered to "a particular person or corporation."

The second area of executive session concerned pending litigation initiated against the Village by the Teamster's Union. Since §100(1)(d) of the Open Meetings Law permits a public body to enter into executive session to discuss "proposed, pending or current litigation", a discussion of ongoing or pending litigation could properly be held in executive session.

The last area considered in executive session dealt with "a possible lawsuit" against a federal agency by the Village. As noted earlier, the Law permits an executive session to discuss "proposed" litigation. In my view, possible litigation does not constitute a sufficient basis for entry into executive session.

It is important to point out, however, that a discussion between a Village Board of Trustees and its attorney might be exempt from the Open Meetings Law. Section 103(3) of the Open Meetings Law states that the provisions of the Law do not apply to "any matter made confidential by federal or state law." Since a discussion between a municipal attorney acting in his or her capacity as such, and a client, a municipal board, is privileged or confidential, such a discussion would be exempt from the provisions of the Open Meetings Law. Therefore, although there may be no provision for executive session that could apply to a discussion of "possible litigation," it is conceivable that a discussion in which a board seeks the advice of its attorney would be exempt from the Open Meetings Law under the attorney-client privilege.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Village Board of Trustees
Anthony Pieragostini, Village Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-377

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 19, 1979

Barry M. Shulman, Esq.
Scolaro, Shulman, Cohen
& Whitelaw, P.C.
One Lincoln Center
Syracuse, NY 13202

Dear Mr. Shulman:

Having been on vacation, I was unable to respond to your inquiry promptly. Please accept my apologies for any inconvenience that may have been caused.

Your inquiry concerns the status of committees of public benefit corporations under the Open Meetings Law. Specifically, you have asked whether a committee meeting during which no definitive action is intended to be taken may be held without providing notice. Further, you indicated that such committee meetings would be held to discuss "the current financial, personnel or organizational status of the public benefit corporation..."

As you may be aware, the Governor signed into law amendments to the Open Meetings Law which become effective on October 1. Enclosed for your consideration are copies of the amended Law as it will appear on October 1, a memorandum transmitted to public bodies in which the amendments are explained, and a memorandum sent to the Counsel to the Governor by this office.

First, the definition of "meeting" [§97(1)] has been amended to reflect the decision of the Court of Appeals in Orange County Publications v. Council of the City of Newburgh, 45 NY 2d 947. In brief, the decision held that any convening of a quorum of a public body for the purpose of discussing public business is a meeting subject to the Open Meetings Law, whether of not there is an intent to take action, and regard-

less of the manner in which a gathering may be characterized. Consequently, in response to your inquiry, a meeting held by a committee of a public benefit corporation to discuss public business is subject to the Open Meetings Law in all respects, whether or not there is an intent to take action.

Second, the definition of "public body" [§97(2)] has been amended to specifically include committees, subcommittees and similar bodies. Consequently, although the status of committees having only the capacity to recommend was unclear under the Open Meetings Law as originally enacted, the amendment clearly indicates that committees and subcommittees, for example, are subject to the Law.

Third, with respect to notice, all meetings of public bodies must be preceded by notice given in accordance with the provisions of §99. There is one change in §99 concerning a new requirement that public bodies designate one or more locations where notice must be posted.

Lastly, the subject matter identified in your letter might in some instances be appropriately discussed during an executive session. Again, I would like to direct your attention to an amendment to the Law. Specifically, §100 (1)(f) will provide that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

In view of the foregoing, the financial history of a particular corporation, or the employment history of a particular person, for example, may be discussed during an executive session. However, a discussion of the "organizational status" of a public benefit corporation would not in my view likely constitute an appropriate subject for executive session.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1248
OML-AO-378

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 19, 1979

Ms. Dolores Chechek
Trustee
Wappingers Board of Education
Miller Hill Road
Hopewell Junction, New York 12533

Dear Ms. Chechek:

As you are aware, I have received your inquiry and materials regarding a request made under the Freedom of Information Law and the status of a "performance plan" regarding the position of superintendent of schools.

First, with respect to your requests for records, the records sought concern purchases of and payments by the District for a number of goods and services provided to the District. In addition, you have requested records reflective of the number of children participating in a CETA summer program, the number of trainees students teachers involved in the program, attendance records and the cost to the District of implementating the program. In my opinion, records concerning the provision of goods and services to the District are available under the Freedom of Information Law. I believe that virtually all such records could be characterized as "statistical or factual tabulstions or data" that are accessible under §87(2)(g)(i) of the Law.

With regard to the CETA program, as I have written in the past, to the extent that statistical or factual data exists that are reflective of the information in which you are interested, I believe it too should be made available.

The second area of inquiry concerns the performance plan for the position of superintendent of schools. As I understand the situation, the question is whether the performance plan should be discussed during an open meeting or whether it may be discussed during an executive session. The matter has been discussed with both you and Dr. Sturgis, and I believe that I have given you the same response. Public or private discussion of the performance plan centers upon §100(1)(f) of the Open Meetings Law, which states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation."

The quoted provision permits the holding of an executive session to discuss the employment history of a person, for example, including the manner in which that person has performed his or her official duties. It does not in my view permit the holding of an executive session to discuss the nature and duties inherent in a position. If it is possible to distinguish between a discussion of the nature of a position and the performance of a particular individual who holds that position, I believe that such distinction must be made in terms of the Open Meetings Law and the ability to enter into executive session. Therefore, if the discussion deals with the duties of any person who might hold the position of superintendent, such a discussion would in my opinion be required to be held in public. However, if the discussion deals with the performance of a particular individual as the superintendent, it is likely that such a discussion could justifiably be held in executive session.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Board of Education

bcc: Dr. Sturgis

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-329

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 20, 1979

Mr. Edward R. Stewart, Jr.
Village Trustee
Village of Sylvan Beach
27th Avenue
Sylvan Beach, NY 13157

Dear Mr. Stewart:

I apologize for the delay in responding to your letter. As I explained to you during our recent conversation, I have been away on vacation until recently.

You have raised questions regarding the ability of the Mayor of the Village of Sylvan Beach to "enter into purchase contracts on behalf of the Village, without prior resolution of the Board." You have also asked whether the mayor may alone hire and pay Village employees without a prior resolution on the part of the Board. Lastly, you have raised questions concerning the propriety of "[P]olling and meeting with selected Village Board members at a private residence for the purpose of predetermining, negotiating or otherwise scheming to conduct or schedule Village business and/or make policy in a non-public setting."

There are several provisions of law that are applicable to your inquiries.

First, §4-400(1)(i) of the Village Law states that "[I]t shall be the responsibility of the mayor...to execute all contracts in the name of the village." As such, it would appear that the Mayor does indeed have the capacity to enter into contracts on behalf of the Village without prior resolution of the Board.

Second, I believe that the Mayor cannot acting alone hire Village employees or pay such employees their wages without the prior resolution of the Board. My contentions are based upon provisions with the same statute as that cited in the previous paragraph. Specifically, §4-400(1)(c) states that "[I]t shall be the responsibility of the mayor...to appoint all department heads and non-elected officers subject to the approval of the board of trustees including the mayor." Further, paragraph (k) of the cited provision states that "[I]t shall be the responsibility of the mayor...to sign checks in the absence or inability of the treasurer or deputy treasurer, if any, when authorized by the board of trustees by resolution, or local law..." In view of the foregoing, it is clear that the Mayor cannot alone hire Village employees without the consent of the Board of Trustees. In a similar vein, the Mayor cannot pay Village employees, unless the Board has authorized him to do so "by resolution, or local law."

Your third question concerns meetings held by members of the Board at a private residence to discuss public business or to make policy "in a non-public setting." In this regard, the Open Meetings Law is applicable. Section 97(1) of the Law defines"meeting" as "the formal convening of a public body for the purpose of officially transacting public business." Despite the vagueness of the definition, the state's highest court has held that any convening of a quorum of a public body for the purpose of discussing public business is a meeting subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized (Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947).

It is also noted that the term "quorum" is specifically defined by §41 of the General Construction Law as follows:

> "[W]henever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by the jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a

> quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group or persons or officers would have were there no vacancies and were not of the persons or officers disqualified from acting."

The quoted provision makes clear that a public body has no authority to act unless a quorum is present. Further, in order to convene a quorum, reasonable notice must be given to each member of a public body. Therefore, while the Mayor may meet with selected members of the Board of Trustees to discuss public business outside the scope of the Open Meetings Law, the duties of the Board of Trustees, including the making of policy, cannot legally be accomplished unless a quorum is present, and unless reasonable notice is given to each member of the Board. In sum, if public policy is determined at the type of gathering described in your letter, it is in my opinion determined in violation of the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-380

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 20, 1979

Mr. Robert M. Chevalier
[redacted]

Dear Mr. Chevalier:

As you are aware, your letter addressed to Comptroller Regan has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information and the Open Meetings Laws.

You have raised several questions concerning the interpretation of the Open Meetings Law and I will attempt to answer each of them.

First, you have asked whether the Law requires that all meetings and work sessions be advertised and, if so, how much notice must be given. As you stated, meetings, work sessions and similar gatherings must be convened open to the public. In addition, all such gatherings must be preceded by notice in accordance with §99 of the Open Meetings Law (see attached). Although §99(3) of the Law provides that a public body need not place a legal notice in a newspaper or "advertise", the public and the news media must nonetheless be given appropriate notice. Section 99(1) states that meetings scheduled less than a week in advance must be preceded by notice given to the news media and posted in one or more designated public locations not less than seventy-two hours prior to a meeting. Section 99(2) states that meetings scheduled less than a week in advance must be preceded by notice given to the news media and posted in the same manner as described previously "to the extent practicable" at a reasonable time prior to the meeting.

Your second question is whether the public may have "input" during meetings and work sessions of town boards or whether town officials may forbid public participation. In this regard, the Open Meetings Law merely provides the public with the ability to attend and listen to the deliberations of public bodies; the Law confers no right upon the public to participate at meetings.

The third area of inquiry involves the capacity of public bodies to stipulate a time limit regarding the length of time that a participant may speak. As noted in the preceding paragraph, the Open Meetings Law does not provide the public with the right to speak or participate at meetings. However, the Law does not prohibit public bodies from adopting reasonable rules to permit public participation. As such, although a public body need not permit public participation, it may do so pursuant to reasonable rules that may be adopted. With respect to the example that you described in which public participation is allowed, I believe that it would be unreasonable for a public body to permit one person to speak for a specified time limit while permitting another to speak as long as he or she desires. In brief, if public participation is allowed, reasonable rules concerning the length of time that a member of the public may speak, for instance, should be adopted in order that an equal opportunity to participate is given to those in attendance.

The fourth question concerns the ability of a board to close a meeting, enter into executive session, and thereafter reopen the meeting. In my opinion, the situation that you described likely complies with the Open Meetings Law. Section 97(3) of the Law defines "executive session" to mean that portion of a meeting during which the public may be excluded. Further, §100(1) of the Law provides a procedure for entry into executive session and limits the subject matter that may be discussed in executive session. The Law states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys."

In view of the quoted provision, it is clear that a public body may enter into executive session only after having convened an open meeting. In addition, it is also clear that a public body may not enter into executive session to discuss the subject of its choice; on the contrary, a public body may enter into executive session only to discuss one or more of the subjects listed in paragraphs (a) through (h) of §100(1) of the Law. Therefore, in response to your question, a public body may enter into executive session after convening an open meeting and then return from executive session when the discussion of a particular subject has been concluded.

The fifth question concerns requirements regarding the compilation of minutes. In this regard, I direct your attention to §101 of the Open Meetings Law. Subdivision (1) of §101 pertains to minutes of open meetings and provides that such minutes must include reference to "all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Subdivision (2) of §101 concerns minutes of executive session. It is important to note in this regard that most public bodies may vote during a properly convened executive session, unless the vote concerns the appropriation of public moneys, in which case the vote must be taken in public. In any event, minutes of executive sessions need consist only of "a record or summary of the final determination" of action taken, "and the date and vote thereon". In view of the foregoing, it is clear that minutes need not consist of a verbatim account of what transpired at a meeting. It is also clear that minutes need not make reference to each and every comment made during a meeting.

Finally, you asked whether a clerk may employ a tape recorder during a meeting while prohibiting the public from so doing. In my opinion, a general rule prohibiting the use of tape recorders at open meetings is invalid.

Until recently, there was but one judicial determination concerning the use of tape recorders at open meetings. In Davidson v. Common Council of the City of White Plains (40 Misc. 2d 1053, 244 NYS 2d 285), the court upheld a prohibition of the use of tape recorders based upon the following reasoning. First, the court found that a public body has the ability to adopt reasonable rules to govern its own proceedings. Second, the court

agreed with the contention of the Common Council that the presence of a tape recorder would detract from the deliberative process. Therefore, third, the court found that a rule prohibiting the use of tape recorders was reasonable due to its disruptive effect on the proceedings.

Nevertheless, the Davidson decision, which was rendered in 1963, has apparently been effectively reversed. In People v. Ystueta (418 NYS 2d 508), which was decided on June 5, 1979, the court recognized technological advances that have been made since Davidson and found that the use of a small cassette recorder would not detract from the deliberative process. In addition, the court found that the clear declaration of legislative intent in the Open Meetings Law announces a policy of openness, which precludes the adoption of a general rule prohibiting the use of tape recorders.

In view of the foregoing, a public body cannot in my opinion adopt a general rule that prohibits the use of tape recorders at open meetings. Further, it could also be argued that if the use of a tape recorder by a town clerk does not interfere with the proceedings of the town board, the use of a tape recorder by others would not detract from the proceedings.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

bcc: Comptroller Edward V. Regan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-381

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 28, 1979

Ms. Catherine VanGorder
District Clerk
Unatego Central School
Otego, New York 13825

Dear Ms. VanGorder:

I have received your letter of September 25 regarding the interpretation of the Open Meetings Law.

Your question concerns the interpretation of §101(2) of the Open Meetings Law regarding minutes of executive session. In my opinion, if a public body merely discusses during an executive session but takes no action, minutes of the executive session need not be compiled. As stated in §101(2), minutes of executive session shall be compiled with respect to "any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon..."

In view of the foregoing, if a public body has adopted a policy under which it merely discusses during executive sessions but takes the action thereafter during open meetings, minutes of executive sessions need not in my view be created.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-382

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 4, 1979

Mr. Eugene J. Corsale
Saratoga County Assessor's Association
Town Office Building
Clifton Park, New York 12065

Dear Mr. Corsale:

I have received your letter of September 29. Your inquiry concerns the status of the Saratoga County Assessor's Association, which is comprised of the assessors of cities, towns and villages in Saratoga County.

Specifically, you have asked whether meetings of the Association must be open to the public and whether the scheduled meetings should be advertised in a local newspaper.

In my opinion, a response to your inquiry hinges upon the scope of the definition of "public body". In this regard, §97(2) of the Open Meetings Law defines "public body" to include:

> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

In my opinion, although the Association is composed of public officials, it does not "conduct public business", nor does it perform a "governmental function". Therefore, I do not believe that the Association is a "public body" subject to the Open Meetings Law. As such, in my view, the Association is neither required to open its meetings to the public nor to advertise its scheduled meetings in a local newspaper.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-383

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 4, 1979

Mr. Isidore Gerber
Executive Director
Liberty Taxpayers Association
31 St. Paul's Place
Liberty, New York 12754

Dear Mr. Gerber:

I have received your most recent letter regarding the interpretation of the Open Meetings Law.

Specifically, there appears to be some confusion regarding the application of a decision rendered by the Court of Appeals, Orange County Publication v. City of Newburgh (45 NY 2d 947), with respect to town zoning boards of appeals. In this regard, you have attached to your inquiry a copy of a letter sent to Peter Gozza, Supervisor of the Town of Liberty, by William C. Rosen, Sullivan County Attorney, in which it was advised that the deliberations of a town zoning board of appeals regarding particular applications are exempt from the Open Meetings Law.

I disagree with Mr. Rosen's contention.

The Orange County Publications decision dealt with two issues that arose with respect to the City of Newburgh. One of the issues pertained to the status of work sessions held by the Common Council. The other concerned closed deliberations of the Zoning Board of Appeals of the City of Newburgh. With regard to the latter, the Appellate Division held that the City of Newburgh's Zoning Board of Appeals is exempt from the Open Meetings Law to the extent that it engages in quasi-judicial proceedings (see 60 AD 2d 409).

It is emphasized that the decision insofar as it applies to zoning boards of appeals dealt only with a city zoning board of appeals. I believe that the Law that governs the conduct of town and village zoning boards of appeals is different from that which governs city zoning boards of appeals.

As you may be aware, §103(1) of the Open Meetings Law states that the Law does not apply to quasi-judicial proceedings. However, §105(2) of the Open Meetings Law provides that any less restrictive provisions of law than the Open Meetings Law remain in effect. In this regard, §267(1) of the Town Law and §7-712(1) of the Village Law, which concern the conduct of meetings of town and village zoning boards of appeals respectively, state in relevant part that:

> "[A]ll meetings of such board shall be open to the public".

Consequently, this Committee has consistently advised that the exemption in the Open Meetings Law regardin quasi-judicial proceedings is not applicable to town or village zoning boards of appeals. On the contrary, the deliberations of such boards are governed respectively by the Town Law, §267(1), and the Village Law, §7-712.

It is noted that a city zoning board of appeals is not governed by any provisions of law analogous to those cited in the Town Law and the Village Law.

Further, a recent decision confirmed the advice of the Committee and held that a town zoning board of appeals is governed not by the Open Meetings Law, but rather by §267(1) of the Town Law. As such, the exemption appearing in §103(1) of the Open Meetings Law is not in my view applicable to town zoning boards of appeals. I have enclosed copies of the decision to which reference was made above, Matter of Katz. It is important to point out that the Katz case was argued twice due to the confusion caused by Orange County Publications regarding quasi-judicial proceedings. The court in Katz, however, specifically distinguished the status of a city zoning board of appeals such as that dealt with in Orange County Publications and town zoning boards of appeals.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Enc.

cc: Peter Gozza
William C. Rosen

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-384

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 9, 1979

Mr. Carl Litt
[redacted]

Dear Mr. Litt:

I have received your letter of September 29 concerning a so-called "informal meeting" held between the Board of Education of the Northport-East Northport Union Free School District and the "administrative council". The correspondence appended to your letter indicates that you were requested to leave the meeting prior to its commencement on the advice of Counsel to the Board. Further, the Counsel to the Board indicated in his letter to the Superintendent that "this meeting arose under the collective agreement between NASA and the school district" and that "it falls within the permissible closed meeting portion of the Open Meetings Law..."

In my opinion, whether or not the subject matter of the discussion could appropriately have been discussed during an executive session, the School Board failed to comply with other aspects of the Open Meetings Law.

First, it is noted that the definition of "meeting" has been recently amended to reflect the expansive interpretation of the Open Meetings Law rendered in Orange County Publications v. Council of the City of Newburgh [45 NY 2d 947 (1978)]. In brief, both §97(1) of the Law and the decision cited above direct that any gathering of a quorum of a public body for the purpose of discussing public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which the gathering may be characterized.

Second, "executive session" is defined in §97(3) of the Open Meetings Law to mean that portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law prescribes the procedure that a public body must follow in order to enter into executive session. The cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the foregoing, it is clear that a public body must convene an open meeting before it can enter into executive session. In addition, a motion must be made and carried by a majority vote of the total membership of the public body which identifies in general terms the subject or subjects intended for discussion in executive session. Moreover, paragraphs (a) through (h) of §100(1) specify and limit the subjects that may appropriately be discussed in executive session. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof, and that a public body may not enter into executive session to discuss the subject of its choice.

Third, §100(1)(e) of the Open Meetings Law provides that, after having followed the procedure described in the preceding paragraph, a public body may enter into executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law", which is commonly known as the "Taylor Law". In my opinion, the quoted ground for executive session may be appropriately asserted only when the subject matter for discussion is or involves collective bargaining negotiations. If the meeting was held for the purpose that you described, as a "kick-off meeting of goals and policy for the new school year", none of the grounds for executive session would in my view be applicable. The fact that the meeting may have been held in accordance with a collective bargaining agreement does not in my opinion automatically bring the discussion within §100(1)(e) of the Open Meetings Law. Further, from my perspective, §100(1)(e) of

the Open Meetings Law was intended to permit public bodies to discuss collective bargaining negotiations behind closed doors to avoid being placed in an unfair position at the bargaining table. Under the circumstances that you described, the Board met with representatives of a public employee union not to engage in collective bargaining, but rather to discuss the goals of the District. I do not feel that the provision in question, §100(1)(e), would be applicable to such a decision.

Fourth, your letter indicates that "[T]here was no public notice given of this meeting nor minutes taken". In this regard, §99 of the Law requires that notice be given to the news media and to the public by means of posting prior to all meetings, whether regularly scheduled or otherwise. Section 101 of the Law prescribes the requirements regarding minutes of open meetings and executive sessions. I believe that those provisions are self-explanatory.

Lastly, you have requested a copy of "The New Freedom of Information Law and How to Use It". The publication to which you made reference is no longer in print. However, a new publication containing explanations of both the Freedom of Information Law and the Open Meetings Law will be available shortly, and I will send you a copy when I receive it. In the interim, enclosed are copies of the Freedom of Information Law and the regulations which govern the procedural aspects of the Law, as well as the amended Open Meetings Law and a memorandum that discusses amendments to the Law that became effective October 1.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk
Encs.

cc: Joseph Beattie
John H. Gross
Margaret B. Crawford

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-385

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

COMMITTEE MEMBERS
T. ELMER BOGARDUS
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JAMES C. O'SHEA
BASIL A. PATERSON
IRVING P. SEIDMAN
GILBERT P. SMITH, Chairman
DOUGLAS L.TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 9, 1979

Mr. James Carbone
The Times Record
40 North Main Street
Mechanicville, New York 12118

Dear Mr. Carbone:

I have received your letter of September 27 in which you requested an opinion under the Open Meetings Law.

According to your letter, on September 26:

> "[T]he Mechanicville City Council met privately before opening its regular meeting. Before going into the private session, Mayor John Fascia said the council had the right to hold a private meeting away from the press and public. He also said he would not discuss the reason for the private meeting.
>
> Peter Enzien, the city attorney, said there was no such law that prevented the council from meeting privately before the regular meeting."

Further, you have indicated that the Mayor informed you during the ensuing open meeting that the Council had discussed "the proposed demolition of a water pump station" during the private session.

Your question is whether, based upon the circumstances described, the Open Meetings Law was violated.

Before responding to your question, I would like to emphasize that the matter has been discussed and both Mayor Fascia, and the City attorney, Peter Enzien. I have attempted to explain the relevant provisions of the Open Meetings Law to them, and believe that they are now familiar with the requirements of the Law.

In my view, the private session was held in violation of the Open Meetings Law. First, §97(1) of the Law, which defines "meeting", was amended recently to codify the holding in Orange County Publications v. Council of the City of Newburgh [45 NY 2d 947 (1978)]. In brief, the Court of Appeals held that the definition of "meeting" encompasses any situation in which a quorum of a public body convenes for the purpose of discussing public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. Since the Court of Appeals decision has been in effect since November, 1978, the interpretation offered above has been effective for almost one year. However, for the purpose of clarification, the Legislature passed amendments effective October 1 that redefine "meeting" to mean "[T]he official convening of a public body for the purpose of conducting public business."

Therefore, in view of the foregoing, if a quorum of the City Council was present for the purpose of discussing or conducting public business, its gathering was in my opinion a meeting that should have been convened open to the public.

Second, in a situation in which a public body may appropriately convene an executive session, it may do so only after having convened an open meeting. Section 97(3) of the Law defines "executive session" to mean that portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law sets forth a procedure that must be followed in order to enter into executive session. The cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

As such, it is clear that an open meeting must be convened prior to an executive session and that a vote must be taken during an open meeting in order to enter into executive session. Moreover, the motion must identify in general terms the nature of the subject or subjects intended to be discussed behind closed doors, and those subjects must be consistent with one or more of the grounds for executive session appearing in paragraphs (a) through (h) of §100(1) of the Law.

And third, the subject matter discussed prior to the open meeting, the demolition of a water station, would not as it was described have been a proper subject for executive session. If that was the case, the discussion should have been held during an open meeting.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Mayor John Fascia
Corporation Counsel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-386

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 10, 1979

David G. Retchless, Esq.
Ontario County Attorney
Ontario County Court House
Canandaigua, New York 14424

Dear Mr. Retchless:

I have received your letter of September 26 addressed to the Attorney General and/or the Committee on Public Access to Records. As a general matter, the Department of Law transmits requests for opinions regarding the Freedom of Information Law and the Open Meetings Law to this office.

Your inquiry concerns the status of committees created by the Board of Supervisors of Ontario County pursuant to the provisions of §154 of the County Law. The cited provision and the rules adopted by the Board of Supervisors indicate that the committees in question have no capacity to take final action. Similarly, committee reports or recommendations are not binding upon the Board. The question is whether such committees constitute public bodies under the amended Open Meetings Law.

Among the amendments to the Open Meetings Law is a redefinition of "public body" to include:

> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general contruction law, or committee or subcommittee or other similar body of such public body" [§97(2)].

I would like to make several points with respect to the new definition.

First, §97(2) as originally enacted included the phrase "transact public business". The work "transact" resulted in numerous conflicts of interpretation. Consequently, it was replaced by "conduct". In my view, the replacement of "transact" with "conduct" was intended to ensure that the definition would be applicable to entities with no power to act, but only the authority to advise or recommend.

Second, as you are aware, the definition of "public body" specifically includes a "committee or subcommittee or other similar body of such body". From my perspective, the alteration in the definition of "public body" was based in great measure upon recommendations made by this Committee in its third annual report to the Legislature on the Open Meetings Law. While the amendments to the Law do not in many instances duplicate the language contained in the Committee's proposals, the staff of the Committee negotiated the amendments to the Open Meetings Law with the Legislature. In the course of negotiations it was clear that the thrust of the amendment to the definition of "public body" was intended to insure that advisory bodies with no authority to take action would be subject to the Law in all respects. Further, I direct your attention to a portion of the proposal made in the Committee's report to the Legislature on the Open Meetings Law:

> "...it has been argued that bodies which do not take final action are not public bodies, because they do not 'transact public business.' Nevertheless, the Court of Appeals affirmed the finding of the Appellate Division in Orange County, supra, that the word 'transact' should be accorded its ordinary dictionary definition, i.e., to discuss or to carry on business. Consequently, the Committee has consistently advised that advisory bodies, committees and the like are public bodies subject to the Law in all respects, even though they lack the ability to take final action. This contention is

> bolstered by the debate in the Assembly that preceded passage of the Open Meetings Law and by judicial determinations. The Assembly sponsor of the bill stated that he intended that the definition of 'public body' include 'committees, subcommittees, and other subgroups' (see transcript of Assembly debate, May 20, 1976, p. 6268-6270). In addition, two judicial decisions have held that advisory bodies are indeed public bodies subject to the Law [see Matter of MFY Legal Services, 402 NYS 2d 510; Pissare v. City of Glens Falls, Sup. Ct., Warren County, March 7, 1979]."

In addition, the report also made reference to Daily Gazette v. North Colonie Board of Education, (412 NYS 2d 494, __AD 2d__), which held that advisory committees consisting of members of a school board were not covered by the Law. In my view, the Legislature believed that the decision was contrary to statements made in the debate that preceded passage of the Open Meetings Law in 1976 and sought to effectively reverse the Daily Gazette decision by means of the amendments in question (see attached, memorandum in support of the amendments).

Lastly, I believe that a review of the elements of the definition of "public body" as amended results in a similar conclusion, i.e., that committees and subcommittees are subject to the Law, even though they may have only the capacity to advise. The entities which you made reference to consist of more than two members, they are required to convene a quorum in order to function or carry out their duties (see General Construction Law, §41), and they perform a governmental function for a public corporation, in this case, Ontario County.

Based upon the foregoing, I believe that the committees that are the subject of your inquiry fall within the scope of "public body" under the amended Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-387

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 11, 1979

Mr. James D. Dynko
Editor
Press-Republican
170 Margaret Street
Plattsburgh, NY 12901

Dear Mr. Dynko:

Thank you for your letter and the materials appended to it. You have requested an advisory opinion regarding the implementation and interpretation of the Open Meetings Law by the Mayor of Plattsburgh, John Ianelli, the Plattsburgh Common Council, and the Plattsburgh Corporation Counsel, Thomas Robinson.

Based upon a review of the materials, I believe that several violations of the Open Meetings Law were committed in connection with the meeting of the Common Council held on September 27.

According to one news article, an executive session was held prior to a regularly scheduled Council meeting to discuss "contract negotiations which could result in possible litigation." Another article stated that the executive session was held to discuss the Plattsburgh city sales tax.

It is important to emphasize at the outset that "executive session" is defined by §97(3) of the Open Meetings Law to mean that portion of an open meeting during which the public may be excluded. Further, §100(1) of the Open Meetings Law prescribes a procedure that must be followed by public bodies prior to entry into executive session. The cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the foregoing, an executive session may be held only after a public body has convened an open meeting. In addition, the motion must identify in general terms the subject or subjects intended for discussion in executive session and carried by a majority vote of the total membership of a public body. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of an open meeting.

It is also important to point out that a public body cannot enter into executive session to discuss the subject of its choice. Paragraphs (a) through (h) of §100(1) of the Open Meetings Law specify and limit the subject matter that may appropriately be discussed during executive session. Although several grounds for executive session may have been offered on September 27, none in my opinion constituted a valid ground for discussion behind closed doors.

For example, "contract negotiations" without more would not in my opinion represent an appropriate ground for executive session. While §100(1)(e) of the Law permits a public body to enter into executive session to discuss collective bargaining negotiations under the Taylor Law, there is no indication in the materials that the Common Council was in any way involved in collective bargaining negotiations.

The Law also permits a public body to enter into executive session to discuss "proposed, pending or current litigation". In my view, "possible litigation" is not a sufficient ground for entry into executive session. Virtually any matter discussed by a public body could result in "possible" litigation, and it is my belief that the exception was intended to enable a public body to discuss litigation strategy behind closed doors when public discussion would place the public body at a disadvantage vis-a-vis a legal adversary. Based upon the materials attached to your letter, there is no indication that litigation had been initiated or that the initiation of litigation was imminent.

Further, I do not believe that a discussion of the city income tax would be reflective of a proper subject for executive session. Essentially, it appears that the discussion of the city income tax dealt with policy; in no way did it pertain to particular individuals, litigation or contract negotiations. Having reviewed the grounds for executive session appearing in the Law, none in my view could have been cited appropriately to discuss the issues surrounding the adoption of a sales tax.

Lastly, an editorial appended to your letter stated that the Corporation Counsel of the City of Plattsburgh, Thomas Robinson, advised that the Council was not bound by the Open Meetings Law because the provisions of the Law presented by the reporter at the meeting in question would not become effective until October 1. Although it is true that amendments to the Open Meetings Law became effective October 1, each of the provisions upon which my previous contentions were based existed under the Open Meetings Law as it originally took effect on January 1, 1977.

While the definition of "meeting" was vague under the Open Meetings Law as originally enacted, in November of 1978, the Court of Appeals, the state's highest court, interpreted the Law expansively. In brief, the Court held that any convening of a quorum of a public body for the purpose of discussing public business is a meeting that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized (see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947). Since the decision was rendered by the Court of Appeals approximately eleven months ago, it has been clear that work sessions, agenda sessions, and similar gatherings all fall within the definition of "meeting" and that such gatherings must be convened open to the public. From my perspective, the Legislature amended the definition of "meeting" to reflect the Court of Appeals' decision. However, the essence of the new definition has been effective for nearly a year due to the decision rendered by the state's highest court.

Therefore, the fact that the amendments to the Open Meetings Law had not taken effect when the Common Council met on September 27 is in my view irrelevant. In my opinion, the session held prior to the regularly scheduled meeting should have been convened open to the public, and the discussion should have been held in full view of the public.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor John Ianelli
Plattsburgh Common Council
Thomas Robinson, Corporation Counsel

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1278
OML-AO-388

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 12, 1979

Mr. Joseph DeSantis, President
Parents of C.O.L.D.
P.O. Box 88
Rocky Point, New York 11778

Dear Mr. DeSantis:

I have received your letter of September 27 as well as the materials appended to it concerning the Freedom of Information Law and the Open Meetings Law (see attached).

Based upon statements made in your letter and the materials, it appears that the Board of Education of the Shoreham-Wading River Central School District has a fundamental misunderstanding of both statutes. The ensuing discussion will pertain to the Freedom of Information Law initially, and an explanation of the Open Meetings Law will follow.

It is emphasized at the outset that the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as a school district, are available, except to the extent that records or portions thereof fall within one or more among eight enumerated grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law. In addition, §86(4) of the Freedom of Information Law defines "record" to include any information "in any physical form whatsoever" in possession of an agency. Therefore, all records in possession of a school district are subject to rights of access granted by the Law.

Further, it is important to note that the introductory language of §87(2) provides that an agency may deny access to "records or portions thereof" that fall within the categories of deniable information. Therefore, it is clear that the Legislature recognized that there may be situations in

which records are accessible or deniable in part. It is also clear that an agency in receipt of a request for records must review the records in their entirety to determine which portions, if any, fall within any of the grounds for denial.

The first ground for denial under the Freedom of Information Law, §87(2)(a), provides that an agency may withhold records or portions of records that are "specifically exempted from disclosure by statute". Stated differently, if an act passed by the State Legislature or by Congress specifically prohibits an agency from disclosing certain records, the cited provision would be applicable. Records falling within such statutory prohibitions would be considered "confidential". The only other situation in which a record may be considered "confidential" would involve a circumstance in which a court determined that disclosure would result in detriment to the public interest [see Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)]. Therefore, a record can be considered "confidential" in but two circumstances, i.e. when a statute prohibits disclosure or when a court determines that disclosure would be detrimental to the public interest. An agency cannot classify a record as "confidential" without the presence of one of the two legal bases described above.

The second ground for denial states that an agency may withhold records or portions thereof which is disclosed would result in an "unwarranted invasion of personal privacy" [§87(2)(b)]. There may be situations in which the deletion of names, for example, or other identifying details could be accomplished without compromising the privacy of any individual whose name might appear. In such a case, I believe that the District would be required to delete identifying details, while providing access to the remainder. Further, although subjective judgments must often be made in order to determine whether a person's privacy might be compromised in an unwarranted fashio by means of disclosure, the courts have held that records concerning public employees that are relevant to the performance of their official duties are accessible, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 664 (Court of Claims, 1978)].

The third ground for denial states that an agency may withhold records or portions thereof "which if disclosed would impair present or imminent contract awards or collective bargaining negotiations" [§87(2)(c)]. The key word in the quoted language is "impair", and the provision enables an agency to withhold records or portions of records when disclosure would hamper the ability of government to engage in a contractual relationship. Therefore, if records contain information regarding the District's collective bargaining strategy and disclosure would place the District in an unfair bargaining position, those portions of the record could in my view be withheld. On the other hand, if the District is engaged in public bidding regarding a particular contract, disclosure would not likely impair the ability of the District to consummate a contractual relationship. Therefore, such records would be available.

The fourth ground for denial concerns trade secrets and information that is maintained for the regulation of commercial enterprise which if disclosed "would cause substantial injury to the competitive position of the subject enterprise" [§87(2)(d)]. In my view, this exception to rights of access would rarely arise, because the School District would not likely obtain trade secrets and because the District is not engaged in the regulation of commercial enterprise.

The fifth exception concerns records compiled for law enforcement purposes [§87(2)(e)]. Again, since the School District is not a law enforcement agency, I do not believe that this ground for denial would arise with any regularity.

The next ground for denial states that an agency may withhold information "which if disclosed would endanger the life and safety of any person" [§87(2)(f)]. For obvious reasons, it is extremely unusual that this exception is appropriately cited.

The seventh exception to rights of access states that an agency may withhold records or portions thereof that:

> "...are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..." [§87(2)(g)].

The quoted provision contains what in effect is a double negative. Although an agency may withhold intra-agency materials, it must disclose statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such materials. According to the Assembly sponsor of the amendments of the Freedom of Information Law, the exception is intended to enable an agency to withhold statements of opinion or advice, but that the statistical or factual data upon which an agency relies for carrying out its duties should be made available (letter from Assemblyman Mark Siegel to Robert J. Freeman, July 21, 1977). Therefore, in my opinion, to the extent that the agenda contains statistical or factual data, instructions to staff that affect the public, statements of policy or determinations, it is accessible unless another ground for denial can properly be cited.

Lastly, an agency may withhold records or portions thereof that "are examination questions or answers which are requested prior to the final administration of such questions" [§87(2)(h)]. Stated differently, if an examination question will be given in the future, the question and the answer may be withheld.

The foregoing represent the only grounds for denial that may be cited to withhold records under the Freedom of Information Law.

The following paragraphs concern the Open Meetings Law.

First, it is emphasized that the state's highest court, the Court of Appeals, has construed the definition of "meeting" appearing in §97(1) of the Law expansively [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947]. In brief, the Court held that any convening of a quorum of a public body for the purpose of discussing public business is a meeting that must be convened open to the public, whether or not there is an intent to take action, and regardless of the manner in which the gathering may be characterized.

Second, §97(3) of the Open Meetings Law defines "executive session" as that portion of an open meeting during which the public may be excluded. Further, §100 (1) of the Open Meetings Law prescribes a procedure that must be followed by public bodies prior to entry into executive session. The cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the foregoing, an executive session may be held only after a public body has convened an open meeting. In addition, the motion must identify in general terms the subject or subjects intended for discussion in executive session and carried by a majority vote of the total membership of a public body. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of an open meeting.

It is also important to point out that a public body cannot enter into executive session to discuss the subject of its choice. Paragraphs (a) through (h) of §100(1) of the Open Meetings Law specify and limit the subject matter that may appropriately be discussed during executive session.

According to the minutes of a special meeting held on September 15, the motion to enter into executive session failed to identify the nature of the subject matter to be discussed. As such, the Open Meetings Law was apparently violated. The minutes of the executive session held on September 18 indicate that the subject matter discussed concerned "proposals for additional space to accomodate the public library." Based upon a review of the grounds for executive session, none in my view could appropriately have been cited to hold an executive session to discuss the proposals identified in the motion.

As in the case of the Freedom of Information Law, in which it is presumed that records are available unless they fall within one or more grounds for denial, it should be presumed under the Open Meetings Law that a public body must deliberate in full view of the public, except when an executive session may properly be convened.

With regard to minutes of executive session, §101(2) of the Open Meetings Law requires that:

> "minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon..."

As I read §101(2), minutes of executive session must be compiled only when action is taken in executive session.

As such, public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

In addition, §87(3)(a) of the Freedom of Information Law requires all public bodies to compile and makeaavailable a voting record identifiable to every member of the public body in every instance in which the member votes.

In view of the foregoing, a school board may deliberate in executive session in accordance with §100(1) of the Open Meetings Law, but it may not in my opinion vote during an executive session, except when the vote pertains to a tenure proceeding.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Shoreham-Wading River Central School District

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-389

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 15, 1979

Mr. Fred Ross
Vice Chairman
Taxpayers Association
114 Westside Drive
Ballston Lake, NY 12019

Dear Mr. Ross:

Your letter of October 5 sent to the Department of State has been transmitted to the Committee on Public Access to Records, which is housed in the Department of State and is responsible for advising with respect to the Freedom of Information Law and the Open Meetings Law.

As requested, enclosed are copies of both Laws, as well as regulations promulgated by the Committee under the Freedom of Information Law, which govern the procedural aspects of that statute and have the force and effect of law.

With regard to the meeting of the Assessors Association, it had been advised earlier that the Association is not likely a "public body" subject to the Open Meetings Law (see attached letter to Eugene Corsale). It would appear that the Assessors Association is merely a group of professionals that meets to discuss common problems. Based upon the description of the Association given to me, I do not believe that it could be characterized as a "public body" as defined by §97(2) of the Open Meetings Law. If you could provide additional information that might result in a different conclusion, please send it to me for further review.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 390

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 16, 1979

Mr. Robert Algmin
[redacted]

Dear Mr. Algmin:

I have received your letter of October 2 as well as the carbon copy of your letter addressed to State Senator Winikow. Please be advised that your initial letter was received only recently by this office.

Your letter and the materials appended to it pertain to several groups functioning within Rockland County government. It appears, however, that you are particularly interested in a meeting held by the Special Board of Health Committee on Transportation of Nuclear Waste.

Since the circumstances surrounding the meeting of the Special Committee are somewhat unclear, the following will consist of a review of the applicable provisions of the Open Meetings Law.

First, it is emphasized that amendments to the Open Meetings Law went into effect on October 1 (see attached).

Second, a key facet of the amendments is a redefinition of "public body" to make specific reference to a "committee or subcommittee or other similar body" of a public body. Under the original Open Meetings Law, the status of committees, subcommittees and advisory bodies was unclear due to the vagueness of the definition of "public body" appearing in §97(2) of the Law. However, as of October 1, committees and subcommittees are clearly subject to the Open Meetings Law in all respects. Consequently, it is possible that there may have been confusion in September regarding the coverage of the Open Meetings Law with respect to meetings of committees and subcommittees.

Third, §99 of the Open Meetings Law requires that notice be given prior to all meetings of a public body. If a meeting is scheduled at least a week in advance, notice must be given to the news media and posted in one or more designated public locations not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, notice must be given in the same fashion "to the extent practicable" at a reasonable time prior to the meeting. Based upon the news clipping that you attached, it would appear that notice of the meeting was given to the news media.

Lastly, it is noted that the Open Meetings Law permits the public to attend and listen to the deliberations of public bodies. The Law does not confer a right upon the public to participate at meetings.

Perhaps the foregoing explanation of portions of the Open Meetings Law will serve to preclude future misunderstandings.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

Enc.

cc: George Cox
Sam Colman
Dr. Stephen Redmond
Senator Linda Winikow

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-391

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 16, 1979

Mr. Herbert F. Mayne
[redacted]

Dear Mr. Mayne:

Thank you for your interest in complying with the Open Meetings Law.

Your question concerns the interpretation of §101(3) of the Law concerning the compilation of minutes.

First, it is important to note that §100(1) of the Open Meetings Law generally permits public bodies to vote during a properly convened executive session, except when the vote concerns the appropriation of public monies. Second, §101(2) of the Law states that "minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action and the date and vote thereon..." Consequently, as I read the Law, minutes of executive session are required to be taken only when action is taken during an executive session by formal vote.

Therefore, if, for example, a public body merely discusses public business during an executive session but takes no action, presumably minutes of that executive session need not be taken. Similarly, if a public body discusses public business during an executive session and thereafter returns to an open meeting to act with regard to the discussion, minutes of the executive session need not be created.

It is noted that the provisions concerning the creation of minutes of an executive session within one week of the executive session existed under the original Open Meetings Law as well as the amended version. Further, it is also important to point out that if action is taken during an open meeting, minutes reflective of that action must be recorded and made available within two weeks of the meeting.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1283
OML-AO-392

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 16, 1979

Mr. Robert J. Whalen
[redacted]

Dear Mr. Whalen:

I have received your letter of October 4 as well as the materials appended to it. The contents concern both the Freedom of Information Law and the Open Meetings Law.

According to the first paragraph of your letter, which concerns the necessity of having a tape recording of meetings of the School Board, a request was made at a meeting in August by a Board member to have an item placed on the agenda for the next Board meeting. You have indicated further that although a motion was made to have the item placed on the agenda, reference to the motion does not appear in the minutes of the meeting. In this regard, §101 of the Open Meetings Law (see attached) provides minimum requirements regarding the contents of minutes. Although it is clear that minutes of an open meeting need not include reference to every comment that was made at a meeting or consist of a verbatim transcript of a meeting, subdivision (1) of the cited provision states that minutes of open meetings "shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." In view of the foregoing, if a motion was made during a meeting, whether or not it was carried, minutes of the meeting must in my opinion include reference to the motion.

According to the second paragraph of your letter, at a special meeting of the Board of Education held in May, a member of the Board voted by telephone. In my opinion, the Open Meetings Law precludes voting be telephone. Section 97(1) of the Law defines "meeting" to

mean "the official convening of a public body for the purpose of discussing public business." Similar language regarding the convening of a public body was found in the Open Meetings Law as originally enacted, and which was in effect at the time of the meeting held in May. Further, the definition of "public body" appearing in §97(2) of the Law makes reference to the requirement that an entity act by means of a "quorum". "Quorum" is defined in §41 of the General Construction Law and specifically requires that a public body can act only be means of a quorum "at a meeting". Since a public body cannot perform its duties without having first accomplished an act of "convening", I believe that the presence of members is required. Consequently, a member of a public body cannot in my opinion vote in absentia by means of a telephone call. Such activity would in my view be contrary to the thrust of the provisions cited above and the Open Meetings Law in general, which is intended to open the deliberative process to the public.

The third paragraph in your letter indicates that you were billed for a copy of a tape recording furnished to you by the School District. In this regard, you have questioned the capacity of the District to charge a trustee for reproducing a tape. Similar questions have arisen in the past and it has consistently been advised that a member of a school board, for example, acting independently and not under the aegis of the board should be accorded the same treatment as any member of the public. If your request had been made at the direction of a majority of the members of the School Board, I believe that it would be inappropriate to assess a fee. However, if the request was made independently, it would appear that the Board could assess a fee for reproduction of the tape recording based upon the actual cost of reproduction.

The second page of your letter makes reference to an opinion from Robert Stone, Counsel to the State Education Department, in which he advised that minutes of executive session are not required under the Education Law. I agree with Mr. Stone's contention. Section 101(2) of the Open Meetings Law provides that:

> "[M]inutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon..."

Therefore, minutes of executive session are required to be compiled only when action is taken during executive session.

Public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

In addition, §87(3)(a) of the Freedom of Information Law requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

In view of the foregoing, a school board may deliberate in executive session in accordance with §100(1) of the Open Meetings Law, but it may not in my opinion vote during an executive session, except when the vote pertains to a tenure proceeding.

Your final question concerns the use and maintenance of a "Freedom of Information" form. I may have suggested to you in the past that the Committee has advised that the public is not required to complete a prescribed form in order to apply for records. Contrarily, the Committee has advised that any request made in writing that reasonably describes the records sought should be sufficient. In addition, the Committee's regulations (see attached) state that although an agency may require that a request be put in writing, it need not. For example, if a request is made for a record that is readily accessible, perhaps an oral request would be acceptable; if a request is made for several records that would involve a search and a review of their contents, it is likely that a written request would be required.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: G. Guy DiPietro, Superintendent

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1285
OML-AO-393

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 17, 1979

Councilwoman Michelle Powers
Town of Southeast
Brewster, New York 10509

Dear Councilwoman Powers:

I have received your letter of October 9 and thank you for your interest in complying with the Open Meetings Law.

The first question concerns the application of the Law to an industrial development agency. In my opinion, an industrial development agency is a "public body" subject to the Open Meetings Law in all respects. Section 97(2) of the Law as amended defines "public body" to mean:

> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Further, §856(2) of the General Municipal Law, which concerns the organization of industrial development agencies, provides that such an agency "shall be a corporate governmental agency, constituting a public benefit corporation". Since §66 of the General Construction Law defines "public corporation" to include a public benefit corporation, such as an industrial development agency, the corporate board of directors of an industrial development agency is an entity which consists of at least two members, is required to act by means of a quorum (see General Construction Law, §41) and performs a governmental function for a public corporation. Therefore, it is a "public body" as defined by §97(2) of the Open Meetings Law.

A town board of ethics is in my view also a "public body" subject to the Open Meetings Law based upon similar reasoning as that offered with respect to industrial development agencies. An ethics board is an entity consisting of at least two members that is required to act by means of a quorum and that performs a governmental function for a public corporation, a town. It is noted, however, that much of the business of an ethics board could be conducted during an executive session. In this regard, §97(3) of the Open Meetings Law defines "executive session" to mean that portion of an open meeting during which the public may be excluded. Further, one of the grounds for executive session, §100(1)(f) states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Since discussions would likely deal with the employment history of a particular individual or a matter leading to the discipline of a particular individual, discussions in executive session could be held in many instances by a town ethics board.

Your final question is whether minutes of such boards or agencies are required. Section 101 of the Open Meetings Law concerns the minimum requirements of minutes and the time limits during which the minutes must be compiled and made available. Subdivision (1) of §101 concerns minutes of open meetings and states that such minutes shall consist of "a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Subdivision (2) states that "[M]inutes shall be taken at executive session of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon..." Subdivision (3) provides that minutes of open meetings must be compiled and made available within two weeks of the meetings and that minutes of executive sessions must be available within one week of an executive session.

It is noted that §101(2) concerning minutes of executive session states that those minutes "need not include any matter which is not required to be made public by the freedom of information law..." With respect to an ethics board, it is possible that some aspects of minutes could result in an "unwarranted invasion of personal privacy" if disclosed. Under such circumstances, records or portions thereof which if disclosed would result in an unwarranted invasion of personal privacy may be withheld under §87(2)(b) of the Freedom of Information Law. Nevertheless, it is emphasized that this Committee had advised and the courts have upheld the notion that disclosure of records relevant to the performance of the official duties of public employees are available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 664 (Court of Claims, 1978)]. Therefore, if, for example, an ethics board determines that a particular public employee should be disciplined, records indicating the disciplinary action would in my view be available.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-394

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 19, 1979

Stuart M. Pearis, Esq.
Pearis, Resseguie, Kline
& Barber
1001 Press Building
P.O. Box 1864
Binghamton, New York 13902

Dear Mr. Pearis:

I have received your recent letter regarding the status of a "steering committee" that was created by means of a resolution adopted by the Board of Managers of the Binghamton General Hospital. Your question is whether the Steering Committee is a "public body" subject to the Open Meetings Law.

Having reviewed the resolution which created the steering committee, I believe that it is a "public body" subject to the provisions of the Open Meetings Law.

The resolution appended to your letter indicates that the Board of Managers of Binghamton General Hospital, which is a public hospital, established a "Steering Committee which shall be co-chaired by the chief executive officer of each hospital, to which each of the two hospitals will appoint an equal number of representatives, to consist of board members, executive management staff, and medical staff..." From my perspective, although membership on the Committee may be divided in terms of representation between a public and a private hospital, the Committee is nonetheless subject to the Open Meetings Law.

The key provision in the Open Meetings Law regarding the status of the Committee is §97(2), which defines "public body" to include:

> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body".

By separating the definition into its elements, I believe that one may conclude that the Steering Committee is a public body.

First, the Steering Committee consists of more than two members. Second, it is in my opinion required to act by means of a quorum pursuant to the provisions of §41 of the General Construction Law. Third, the introductory provision of the resolution indicates that the Steering Committee is intended to "conduct public business" and "perform a governmental function". Fourth, the governmental function is carried out on behalf of a public corporation, the City of Binghamton. And fifth, the Steering Committee is a committee of a governing body, the Board of Managers of Binghamton General Hospital.

In sum, I believe that the Steering Committee meets each of the conditions necessary to be characterized as a "public body" as defined by §97(2) of the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Board of Managers

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 395

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 23, 1979

Ms. Muriel Reynolds
[redacted]

Dear Ms. Reynolds:

I have received your letter dated September 30 which was received by this office on October 15. Your inquiry raises questions regarding the implementation of the Open Meetings Law by the Wappingers Central School District Board of Education.

As you are aware, this office has had numerous contacts with the Board of Education during the past two or three years. Consequently, I took the liberty to contact Dr. Sturgis, Superintendent of the District, to elicit his comments prior to responding to your inquiry.

You have indicated that two newspapers had announced that a School Board meeting held on September 24 was scheduled to begin at 8:00 p.m. Nevertheless, you have contended that the meeting began at 7:30 p.m. and that the gathering was closed to the public.

According to Dr. Sturgis, the Board of Education has for several years conducted "public workshop meetings" beginning at 7:30 p.m. during which the public is often given an opportunity to express its views before the Board and to discuss personnel issues regarding particular employees. As I understand it, the session beginning at 7:30 is convened open to the public and the Board then may enter into executive session so that the public is not required to sit and wait for the Board to begin its public deliberations. If the public workshop meetings are convened as Dr. Sturgis has described them, and if the procedural requirements of the Open Meetings Law are followed, I do not believe that any violations of law have been committed.

Nevertheless, the following will consist of a review of the requirements of the Open Meetings Law.

First, every meeting must be convened as an open meeting. Second, each meeting must be preceded by notice given in accordance with §99 of the Law (see attached). Third, "executive session" is defined by §97(3) of the Law to mean that portion of an open meeting during which the public may be excluded [see §97(3)]. Further, §100(1) of the Law prescribes the procedure for entry into executive session as follows:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the quoted provision, it is clear that a motion must be made during an open meeting to enter into executive session. In addition, the motion must be carried by a majority vote of the total membership of a public body and identify in general terms the subject matter intended for executive session.

With respect to the matters discussed that were identified to me by Dr. Sturgis, §100(1)(f) of the Law permits a public body to hold an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Therefore, if, for example, the employment history of a particular individual or individuals represents a topic for discussion, such discussion may be held in executive session so long as the procedure described above is followed.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Enc.

cc: Dr. Sturgis
School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-396

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR

ROBERT J. FREEMAN

October 23, 1979

Josephine Wells, M.D.
[redacted]

Dear Dr. Wells:

Thank you for your interesting letter of October 14.

With respect to the question raised concerning notice of meetings, I direct your attention to §99 of the Open Meetings Law, a copy of which is attached. In brief, subdivision (1) of §99 provides that notice of meetings scheduled at least a week in advance must be given to the news media and posted in one or more designated public locations not less than seventy-two hours prior to such meetings. Subdivision (2) states that if a meeting is scheduled less than a week in advance, notice must be given to the news media and posted in the same fashion as indicated earlier "to the extent practicable" at a reasonable time prior to the meeting. As such, it is clear that notice need not be given two weeks prior to a meeting.

You have also asked "who is 'the press'". In my opinion, a member of the news media or "the press" would include a "professional journalist" who, according to §79 (h) of the New York State Civil Rights Law, is one:

> "who, for gain or livelihood, is engaged in gathering, preparing or editing of news for a newspaper, magazine, news agency, press association or wire service."

In my view, notice under the Open Meetings Law must be given to representatives of the news media, which means at least two professional journalists. The Law does not specify which representatives of the news media must be contacted, but only that notice must be given to at least two.

With regard to your situation regarding the confidentiality of medical records, I would have to gain additional information to advise you accordingly under the Freedom of Information Law. Nevertheless, if one of the functions of the Advisory Committee for Public Health Nurses involves reviewing patients' charts, it would appear that confidentiality would of necessity be waived in order to carry out your duties. Stated differently, the Committee would not be able to function as intended without the ability to inspect the charts.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 397

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 23, 1979

Mr. Paul A. Palmgren
[redacted]

Dear Mr. Palmgren:

I have received your letter of October 4.

Your inquiry once again concerns the implementation of the Open Meetings Law by the Jamestown City School District Board of Education.

First, you have sought my comments with respect to paragraph 4 of your letter which, as I interpret it, concerns an executive session to discuss several topics, including matters concerning a contractor that could "lead to a bid", "maintenance cost-cutting" and the possibility of the dismissal or transfer of "particular persons".

It appears that a focal point of the question is §100(1)(f) of the Open Meetings Law, which provides that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

You probably remember that §100(1)(f) of the Open Meetings Law as originally enacted made reference to "any person" as opposed to a "particular person" in the amended Law. The change is intended to insure that matters of policy that relate tangentially to "personnel" be discussed in public, while concurrently permitting a public body to discuss "particular" individuals during an executive session.

In the context of your letter, it is unclear whether an executive session would have been appropriate. If, for example, the school board was engaged in a discussion of "cost cutting" in general terms due to budgetary constraints, I believe that such a discussion would be required to be held in public. Contrarily, if, for instance, the discussion dealt with the performance of particular employees and their employment histories, the discussion could in my opinion have been held during an executive session.

Item 12 of your letter pertains to the scheduling of an executive session in advance as indicated in the agenda attached to your letter. In my view, public bodies technically cannot schedule an executive session in advance. As you are aware, "executive session" is defined by §97(3) of the Law as that portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law prescribes a procedure for entry into executive session which in part involves the passage of a motion during an open meeting by a majority of the total membership of a public body prior to entry into executive session. There may be situations in which members of a public body are absent or in which they may abstain from voting. In such circumstances, it may be impossible to adduce in advance whether or not there will be a sufficient number of votes to carry a motion for entry into executive session. Consequently, it has been consistently advised that a public body cannot schedule an executive session in advance, for it cannot know in advance whether there will be a sufficient number of votes to pass a motion for entry into executive session.

Item 11 of your letter seems to question whether the subject matter discussed in executive session is indeed appropriate for executive session. In this regard, my only comment is that I believe that there must be a degree of trust in those who represent the public.

Lastly, as the present time, I have no plans to be in or around Jamestown. However, if the occasion arises to be in the vicinity of Jamestown, I will let you know.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jamestown School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 398

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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DOUGLAS L.TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 24, 1979

Mr. Bill Hoffmann
Patent Trader
Box 240
Mount Kisco, NY 10549

Dear Mr. Hoffmann:

I have received your letter of October 18 regarding the implementation of the Open Meetings Law by the Village Board of Trustees of the Village/Town of Mt. Kisco.

There are essentially two provisions of the Open Meetings Law which have a bearing upon the situation that you described and your complaints.

The first concerns §100(1)(d) of the Open Meetings Law, which permits a public body to enter into executive session to engage in "discussions regarding proposed, pending or current litigation." From my perspective, §100(1)(d) is intended to enable public bodies to enter into executive session to discuss litigation strategy with respect to imminent or ongoing litigation. It is noted that many public bodies have in the past sought to enter into executive session to discuss "possible" litigation. In this regard, the Committee has advised that any subject could relate to "possible" litigation, and that litigation must be imminent in order to cite the provision in question appropriately.

The second area of the Open Meetings Law that is relevant to your question is §103(3), which states that a discussion of "any matter made confidential by federal or state law" is exempt from the Open Meetings Law. Stated differently, the Open Meetings Law simply does not apply when an exemption found with §103 can properly be cited.

It is important to note that matters made exempt from the Open Meetings Law and matters falling within the grounds for executive session both pertain to private discussions. However, as you are aware, an "executive session" is a portion of an open meeting during which the public may be excluded [see §97(3)]. Further §100(1) of the Law prescribes a procedure that must be followed by public bodies prior to entry into executive session. In relevant part, §100(1) states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the foregoing, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof. It is also clear that an executive session may be held only after having convened an open meeting.

If a matter is "exempted" from the Open Meetings Law, none of the provisions of the Open Meetings Law are applicable. For example, if a discussion falls within an exemption, a public body need not convene an open meeting or make a motion during an open meeting to close its doors.

With regard to the specifics of your inquiry, it has been long established in case law that a municipal attorney and his or her client, a municipal board, may engage in an attorney-client relationship, which is privileged and confidential. Stated differently, when a client seeks legal advice from an attorney, the discussion between the attorney and the client constitutes a privileged communication. Therefore, when a municipal attorney provides legal advice to a client in his or her capacity as an attorney, the attorney-client relationship has in my view been established, and discussions subject to the attorney-client relationship would in my opinion be privileged.

In terms of the Open Meetings Law, since a discussion subject to the attorney-client privilege constitutes a "matter made confidential by state law", it would be exempted from the Open Meetings Law. Again, it is emphasized that a matter exempted from the Open Meetings Law need not be considered as part of an open meeting and need not be convened by means of the mechanism required for entry into executive session.

I am not sure that the foregoing explanation will help you significantly. I do hope, however,that it will serve to clarify your understanding of the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Village Board of Trustees
Anthony J. Pieragostini, Village Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-399

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 25, 1979

Murray Steyer, Esq.
Steyer & Sirota
235 Main Street
White Plains, New York 10601

Dear Mr. Steyer:

Thank you for your letter and your interest in complying with the Open Meetings Law. You have sought to confirm a matter that we discussed on October 22 regarding the status of committees under the amended Open Meetings Law.

Specifically, the facts that you presented concern advisory committees composed of one member of a board of education of a central school district and a fixed number of citizen members. You have asked whether a committee created in accordance with the facts described would constitute a "public body" subject to the provisions of the Open Meetings Law.

In my opinion, such an advisory committee would indeed be subject to the Open Meetings Law in all respects.

Section 97(2) of the Open Meetings Law as amended defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By reviewing the definition in terms of its components, I believe that one can conclude that an advisory committee is subject to the Law.

First, both a board of education and the committees in question are entities consisting of more than two members. Second, a school board is required to act by means of a quorum under §41 of the General Construction Law. I would also contend that a committee is required to act by means of a quorum, for it has been held "that when persons are formally requested to advise the legislative and executive officers of a municipality and to assist legislative officers in deliberating that such persons are charged with a public duty" and therefore would be subject to §41 of the General Construction Law (see Pissare v. City of Glens Falls, Sup. Ct., Warren Cty., March 7, 1978). Third, both a school board and an advisory committee perform a governmental function for a public corporation, in this instance a school district. Lastly, an advisory committee clearly constitutes a "committee or subcommittee or other similar body" of a public body, a board of education.

In sum, in view of the clarifying amendments to the definition of "public body", it is my view that an advisory committee is subject to the Open Meetings Law in all respects.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-400

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 29, 1979

Richard H. Nealon, Ed. D.
Superintendent of Schools
Pembroke Central School District
Routes 5 and 77
Corfu, New York 14036

Dear Dr. Nealon:

Thank you for your letter of October 25 and your interest in complying with the Open Meetings Law.

Your inquiry concerns a situation in which the Pembroke Central School District Board of Education entered into executive session after having convened a regularly scheduled meeting to consider an appeal regarding a pupil disciplinary matter. Your questions involve whether the name of the pupil involved should have been stated in the motion to enter into executive session, whether the vote taken on appeal should be included as part of the minutes of the regular meeting, or whether it should be recorded separately within minutes for executive session. In a related sense, you have asked whether if a separate set of minutes is made, should those minutes be kept with others that are available for public inspection. And lastly, you have asked whether the vote taken in executive session should state the name of the pupil involved.

It is important to note at the outset that several provisions of law are involved under the factual circumstances that you described. They include the Open Meetings Law, provisions of the Education Law and the federal Family Educational Rights and Privacy Act (20 USC §1232g), which is commonly known as the "Buckley Amendment".

As you are aware, a public body, such as a school board, may engage in private discussion by means of entry into executive session. An executive session is defined as a portion of an open meeting during which the public may be excluded [see Open Meetings Law §97(3)]. Further, §100(1) of the Law prescribes a procedure that must be followed by

public bodies prior to entry into executive session. In brief, a public body must carry a motion made during an open meeting which identifies in general terms the subject matter that it seeks to discuss in executive session. Clearly, the subject of disciplinary action considered with respect to a student would be a proper subject for executive session, for it falls within the scope of §100(1)(f) of the Law.

Although the mechanism of entry into executive session provides one basis for holding closed door discussions, there is another which in my view would be more appropriate under the circumstances. Specifically, §103 of the Open Meetings Law lists three "exemptions" from the Law. If a matter falls within one or more of the exemptions, the Open Meetings Law simply is not applicable. For example, if a matter arises that is exempt from the Open Meetings Law, a meeting would not be required to be convened as an open meeting, and the procedural requirements concerning entry into executive session would not be required to be followed to engage in a private discussion.

One of the exemptions states that the Open Meetings Law does not apply to "any matter made confidential by federal or state law" [see §103(3)]. In my opinion, a discussion of disciplinary action considered with respect to a particular pupil would be "exempt" from the Open Meetings Law, for the Buckley Amendment requires the confidentiality of education records that identify a particular student or students, The general rule of confidentiality applies to all except the parents of students under the age of eighteen and the students themselves when they reach the age of eighteen. Since the Buckley Amendment makes education records pertaining to a specific student confidential, a discussion relative to those records would constitute "a matter made confidential" by federal law which would be exempt from the provisions of the Open Meetings Law.

Consequently, although the Board may have used an executive session as the vehicle for discussing the matter in question, it was in my view a matter that was likely exempt from the Open Meetings Law. As such, a private discussion could likely have been held without holding an executive session.

Further, as a general matter, it has been advised that a motion to discuss a particular person under §100(1)(f) made during an open meeting need not identify that person. Therefore, if the School Board seeks to discuss matters leading to the discipline of a particular teacher, for example, under §100(1)(f) of the Open Meetings Law, the motion to enter into executive session would not in my opinion be required to identify the subject of the discussion.

In view of the foregoing, I believe that your questions can be answered as follows. First, the name of the pupil need not be provided, whether or not an executive session is the vehicle used to enter into a private discussion. Again, it is emphasized that such a discussion would likely be exempt from the Open Meetings Law due to provisions of federal law, thereby nullifying the need for an executive session. Second, since the vote would likely identify a particular student, the record of the vote would be confidential under the Buckley Amendment. As such, I would suggest that a separate record of the disciplinary action be kept. Third, it has generally been advised that school boards cannot vote or otherwise take action during an executive session, except in the case of tenure proceedings under §3020(a) of the Education Law. The rationale for that advice is based upon the provisions of §1708(3) of the Education Law, which has been judicially interpreted to require public voting by school boards in all instances, except tenure proceedings. Nevertheless, it is reiterated that actions concerning particular students could likely be considered and acted upon outside the scope of the Open Meetings Law due to the confidentiality requirements contained in federal law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-402

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 31, 1979

Mr. Kevin J. Mulqueen
Trustee
Village of Walden
Municipal Building
Walden, New York 12586

Dear Mr. Mulqueen:

Thank you for your letter of October 25 and your interest in complying with the Open Meetings Law. Your question is whether it is necessary to name a particular employee who is the subject of a discussion held in executive session in accordance with §100(1) of the Open Meetings Law.

In my opinion, the motion need not identify the particular employee who is the subject of the discussion.

Section 100(1) of the Law states that a public body may enter into executive session to discuss:

> "...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

The Committee has consistently advised that the provision quoted above is largely intended to protect personal privacy. Consequently, it is my view that a public body need not identify the subject of an executive session held pursuant to §100(1)(f).

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-402

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 31, 1979

Arthur A. Katz, Esq.
Warshaw, Burstein, Cohen,
Schlesinger & Kuh
555 Fifth Avenue
New York, New York 10017

Dear Arthur:

Thanks for sending a copy of your opponents' brief.

I have but one comment to make regarding the brief. Specifically, I believe that the "question involved" cited by your opponents in the brief is the wrong question. The brief contends that the question is whether a town zoning board of appeals may "weigh evidence, apply the law, and reach a conclusion in an executive session and not be in violation" of the Open Meetings Law.

From my perspective, although the Open Meetings Law is the statute that generally governs public access to meetings of public bodies, it is not the statute that governs rights of access with respect to a town zoning board of appeals. On the contrary, the question should be whether §267(1) of the Town Law means what it says, or whether a town zoning board of appeals can flaunt its intent at will and with impunity.

"Executive session" is clearly defined by §97(3) of the Law. Further, §100(1) of the Law specifies the procedure for entry into executive session and limits the subject matter that may appropriately be discussed in executive session. In my opinion, none of the grounds for executive session appearing in §100(1)(a) through (h) of the Open Meetings Law would constitute valid grounds for closed door discussions relative to weighing evidence, applying the law or reaching conclusions. In fact, if the question is as stated, might it not represent a concession that the Open Meetings Law is applicable and that the exemption regarding quasi-judicial proceedings is not?

In short, I believe that the question framed is misleading and that it misses the mark. As stated earlier, my question would be whether §267 of the Town Law means what it says.

Good luck. Keep in touch.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1299
OML-AO-403

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 8, 1979

Mr. Michael J. Lurie
[redacted]

Dear Mr. Lurie:

Thank you for your letter of October 28 and your interest in compliance with the Open Meetings Law. You have raised four questions and I will attempt to answer each of them.

First, you have asked whether the board of a fire district may hold a "budget meeting" without a public notice, "in light of the fact that the action was not taken at a regular meeting". In this regard, §99 of the Open Meetings Law requires that notice be given prior to all meetings, whether regularly scheduled or otherwise. If a meeting is scheduled at least a week in advance, notice must be given to the news media and posted in one or more designated public locations not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, notice must be given to the news media and posted in the same manner as described earlier "to the extent practicable" at a reasonable time prior to the meeting.

Second, you have asked whether a budget meeting of a fire diestrict board could be considered a "public hearing" at which the public is entitled to speak. It is important to note that there may be a distinction between a meeting and a hearing. A meeting generally pertains to a situation in which a public body deliberates collectively. A hearing might involve a situation in which members of the public are specifically given an opportunity to express their views. Further, as a general matter, the Open Meetings Law permits the public to "attend and listen to" the deliberations of public bodies. It is silent with respect to public participation. Consequently, the Committee has consistently advised that

the Open Meetings Law confers no right upon the public to participate at meetings. Therefore, if a public body chooses to permit public participation, it may do so, but it need not.

Your third question concerns the right of a non-resident fireman to request a copy of "public information". In this instance, the Freedom of Information Law governs rights of access. That statute provides and the courts have interpreted it to mean that accessible records should be made equally available to any person, without regard to status or interest. As such, the interest or the residence, for example, of an individual who requests records is irrelevant to rights of access.

Your final question again pertains to the ability of the public to participate at meetings or hearings. To reiterate, the Open Meetings Law does not provide a right on the part of the public to participate at meetings. In the case of a public hearing, I believe that the courts have held that any person who wishes to speak at a public hearing should be given a reasonable opportunity to do so.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-404

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 9, 1979

Mr. James Hinkle
Schenectady Gazette
11 Church Street
Gloversville, New York 12078

Dear Mr. Hinkle:

I have received your letter of October 26 which raises several questions regarding the interpretation of the Open Meetings Law.

The first question concerns a problem that has arisen often. Specifically, you have indicated that the Fulton County Board of Supervisors, during a discussion of a sales tax distribution formula, entered into executive session on the basis of §100(1)(d) of the Open Meetings Law. That provision states that a public body may enter into executive session to discuss "proposed, pending or current litigation".

In my opinion, the discussion as you described it could not have appropriately been held behind closed doors.

From my perspective, §100(1)(d) of the Open Meetings Law is intended to permit public bodies to enter into executive session to discuss litigation strategy. The purpose of the exception is obvious, i.e. that a public body should not have to disclose its litigation strategy to the public, which may include a legal adversary. Further, although it is clear that pending or current litigation may clearly be discussed in executive session, numerous inquiries have arisen regarding the scope of "proposed" litigation. Many have argued that "possible" litigation falls within §100(1)(d). Nevertheless, the Committee has consistently advised to the contrary, for virtually any subject of discussion could result in "possible" litigation. In my view, there must be a degree of imminence regarding the initiation of litigation for a discussion to fall

appropriately within the scope of §100(1)(d). Based upon the facts as you presented them, no ground for executive session could in my opinion have been cited to discuss the sales tax distribution formula.

The second question pertains to a situation in which the Gloversville School Board asked the news media to leave a committee meeting in order to meet in executive session. You have indicated that the Superintendent "disputed the claim that a committee had to follow the outlined procedures for entering such a session". As you are aware, amendments to the Open Meetings Law went into effect on October 1. One of the changes in the Law concerns the definition of "public body" [see §97(2)]. Under the original Law, there was some question as to whether its provisions included committees, subcommittees and similar bodies. That question has been removed due to the clear inclusion of such groups within the definition of "public body" as amended. In my opinion, committees, subcommittees and similar groups are required to follow the same procedure and otherwise comply with the Open Meetings Law in the same fashion as governing bodies. In short, I believe that the amendment to the definition of "public body" is intended to impose the same duties upon committees, subcommittees and the like as those imposed upon a governing body.

Lastly, you have written that the Gloversville Common Council called an executive session "to discuss salaries for non-union posts". You have further indicated that the executive session was protested and that "the council said personalities were not to be discussed". In this regard, I direct your attention to another area of the Open Meetings Law that was amended. Specifically, §100(1)(f) now permits an executive session for the purpose of discussing:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

It is noted that the original Law made reference to discussions relative to "any person or corporation" rather than "a particular person or corporation". The purpose of the amendment, which was based upon a proposal submitted to the Legislature by the Committee, was to clarify the intent of the provision quoted above. The Committee had consistently advised that §100(1)(f) is intended to protect personal privacy, not to shield matters regarding policy under the guise of privacy. The amendment confirms the position taken by the Committee.

With respect to the situation that you described, if, for example, the salary of a particular person was being discussed, it is likely that an executive session would have been appropriate, for that person's employment history would be considered. If, on the other hand, the salaries of a number of non-union employees were being discussed generally, I believe that such a discussion should have been open to the public. It is important to point out, too, that §100(1)(e) of the Open Meetings Law permits a public body to discuss collective bargaining negotiations under the Taylor Law. That provision would not be applicable to the facts presented because neither collective bargaining nor a public employee union were involved.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Fulton County Board of Supervisors
Gloversville Common Council
Gloversville School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-405

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 13, 1979

James J. Clynes, Jr., Esq.
Seneca Building, Third Floor
121 East Seneca Street
P. O. Box 580
Ithaca, New York 14850

Dear Mr. Clynes:

I have received your letter of October 29 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, a reporter for the Ithaca Journal was excluded from a gathering held to discuss a productivity project. Based upon a memorandum from Robert O. Dingman, the Superintendent of Public Works, each of the Commissioners of Public Works was given notice of the gathering. In addition, the memorandum stated that he "asked for a special meeting at 7 p.m. on Wednesday, October 17..." in his office "to discuss with the division heads and Mr. Spanier any questions" concerning the recommendations. He also wrote that "it is my intention as a result of the meeting to be making a positive recommendation for you to adopt, hopefully at the next board meeting". Your letter also indicates that the Board of Public Works consists of seven members, four of whom were in attendance at the beginning of the "meeting", and who were joined later by the Mayor, who is also a member of the Board.

The questions are whether the gathering as you described it constituted a "meeting" under the Open Meetings Law, and, if so, whether the reporter for the Ithaca Journal was properly excluded from the gathering.

As you are aware, the controversy has been discussed not only with you but also with the Corporation Counsel for the City of Ithaca, who according to your letter claimed that the gathering was merely an "unofficial meeting", and two members of the staff of the Ithaca Journal.

I must admit that I am somewhat confused regarding the intent of the gathering. Although it appears that the Commissioners of Public Works were convened as a body to deliberate collectively with respect to a particular issue, the memorandum does not clearly indicate that a Board meeting would be held.

Assuming that the Commissioners of Public Works were indeed convened as a body for the purpose of deliberating, the gathering was in my view a "meeting" subject to the Open Meetings Law in all respects. If it was a "meeting", it should have been open to the public and preceded by notice given pursuant to §99 of the Open Meetings Law.

It is noted that §97(1) of the Law as amended defines "meeting" as the "official convening of a public body for the purpose of conducting public business". From my perspective, the new definition of "meeting" was intended to be consistent with the direction provided by the Court of Appeals in Orange County Publications v. Council of the City of Newburgh, [45 NY 2d 947 (1978)]. In brief, the Court of Appeals affirmed an Appellate Division decision which held that any convening of a quorum of a public body for the purpose of discussing public business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized.

Although the Corporation Counsel may have characterized the gathering as an "unofficial meeting", the memorandum in support of the amendments to the Open Meetings Law submitted by the Assembly Committee on Rules indicates that the inclusion of the word "official" was intended "to avoid inadvertently including chance meetings and social gatherings". Therefore, I do not believe that a meeting may be removed from the scope of the Open Meetings Law merely by characterizing it as "unofficial". Moreover, it is clear that notice of the meeting was given to each member of the Board of Public Works. The provision of notice to each member in my view requires that I advise that the meeting was in my opinion "official" and that it could not be considered "inadvertent" or a "social gathering", for example.

It is also clear that the Board of Commissioners is a "public body" as defined by §97(2) of the Law. The Board is an entity that is required to act by means of a quorum under §41 of the General Construction Law, it consists of more than two members, and it performs a governmental function for a public corporation, the City of Ithaca.

In conclusion, based upon the facts as you have described them, it appears that the gathering in question was a "meeting" that should have been convened open to the public and preceded by notice, for it represented "the official convening" of the Board of Public Works "for the purpose of conducting public business". As such, it appears that the reporter was improperly excluded from the meeting.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Robert O. Dingman
Martin Shapiro
Corporation Counsel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-406

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 19, 1979

Dr. Lee G. Peters
District Superintendent of Schools
Sole Supervisory District of
Cortland and Madison Counties
Clinton Avenue Extension
Cortland, New York 13045

Dear Dr. Peters:

Please accept my apologies for the lateness of my response to your thoughtful letter of October 23. I am pleased to report, however, that my tardiness was due to the birth of my son.

Your inquiry concerns the propriety of an executive session held by the Cortland-Madison Board of Cooperative Services. The executive session in question was publicized by means of an article on October 18, 1979 appearing in the Cortland Standard in which it was written that I advised that the Board violated the Open Meetings Law by authorizing an executive session.

With regard to the news article, my telephone log indicates that the Open Meetings Law and the provisions for executive session were discussed with a reporter for the Cortland Standard, Marlene Kennedy, on October 17. At the time, I believe that the questions were raised in a hypothetical sense, for the meeting during which the executive session was held had not yet been convened. Consequently, I believe that I advised that if one hypothetical course of action would be taken, no violations of the Open Meetings Law would be committed. Similarly, I believe that I also advised that if another course of action would be taken, the Open Meetings Law would be violated.

It is emphasized at this juncture that the Committee has no authority to issue "rulings". On the contrary, the Committee is given the capacity to give advice under the Freedom of Information Law and the Open Meetings Law. Therefore, advice regarding either statute given to a member of the news media or to yourself, for example, should not be considered as binding. Rather, I believe that it should be considered for what it is, the advice of an agency charged with the responsibility of overseeing both laws.

With specific regard to the executive session in question, the focal point is §100(1)(f) of the Open Meetings Law, which as amended, permits a public body to enter into executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation."

It is noted that the provision quoted above represents a change from the analogous provision of the original enactment. The Open Meetings Law in its original form stated that a public body could enter into executive session to discuss:

> "the medical, financial, credit or employment history of <u>any</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of <u>any</u> person or corporation" (emphasis added).

The amendment to the Law, which substitutes "particular" person or corporation for "any" person or corporation, was due to the following rationale, which appeared in the Committee's third annual report to the Legislature on the Open Meetings Law:

> "[T]he quoted provision [§100(1)(f)] has become known as the 'personnel' exception to the Open Meetings Law. Many public bodies have entered into executive session to discuss matters which tangentially affect public employees. It is the Committee's contention that paragraph (f) is not intended to shield discussions regarding policy under the guise of privacy. Clear distinctions may be made between situations in which 'personnel' are discussed directly and indirectly. For example, when a municipal board considers the dismissal of public employees for budgetary reasons, the discussion should be public, for issues regarding policy, not the privacy of public employees, would be at issue. Conversely, when the same board considers the dismissal of a particular employee because that person has not performed his or her duties adequately, the discussion could properly be discussed in executive session, for it would deal with the privacy of a named individual."

In view of the foregoing, the basis for the amendment of the Law involved a desire to enable public bodies to discuss matters behind closed doors when the discussion would have a bearing upon the privacy of a particular individual. Concurrently, it was also intended that matters of policy that indirectly affect personnel should be discussed during open meetings.

As I advised the Cortland Standard and as you pointed out in your letter, an executive session cannot generally be held to discuss a job description. Presumably, such a discussion would involve the parameters of a position, regardless of who might hold that position. However, if the discussion dealt with the performance of a particular employee who holds a particular job and if the discussion essentially dealt with the employment history of a particular person, I would suggest that such a discussion could properly be held under §100(1)(f) of the Open Meetings Law.

Admittedly, it may in many instances be difficult to know the subject matter of a discussion in advance. Therefore, it may be difficult to know whether a discussion will indeed be appropriate for executive session.

In this regard, I would recommend that public bodies view the Open Meetings Law in the following fashion. Like the Freedom of Information Law, which is based upon a presumption of access, the Open Meetings Law is in my opinion based upon a presumption of openness. In short, the Freedom of Information Law provides that all records in possession of government are available, except when a record or a portion of a record falls within one or more of the enumerated grounds for denial [see §87(2)(a) through (h)]. Similarly, the Open Meetings Law is based upon a presumption of openness and permits the holding of an executive session only to the extent that a portion of a meeting falls within one or more of the eight grounds deemed appropriate for executive session [see §100(1)(a) through (h)]. Therefore, if it is unclear whether a discussion will be appropriate for executive session, it is suggested that it be conducted during an open meeting unless or until it becomes clear that a proper ground for executive session arises during the discussion.

For example, in the situation that you described, if the discussion dealt initially with the parameters of a particular position, that discussion should in my opinion have been held during an open meeting. However, when the discussion began to focus upon the employment history of a particular individual who holds the position being discussed, a motion could then be made to enter into executive session to discuss the employment history of a particular person.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marlene Kennedy

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-407

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 20, 1979

Mr. Daniel E. Troy
Senior Class Representative
NYS School of Industrial and
Labor Relations
Cornell University
P.O. Box 1000
Ithaca, New York 14853

Dear Mr. Troy:

Thank you for sending a copy of the "faculty legislation" of the New York State School of Industrial and Labor Relations at Cornell University. Your question is whether the Open Meetings Law applies to the faculty meetings of the School of Industrial and Labor Relations.

It is important to emphasize at the outset that litigation has been initiated regarding the application of the Open Meetings Law to the Cornell University Board of Trustees. As you are aware, I prepared an opinion last March concerning that issue in which it was advised that the Board of Trustees of Cornell University is subject to the Open Meetings Law to the extent that it discusses matters relative to its four statutory colleges and its law enforcement functions described in §§5708 and 5709 of the Education Law. I have enclosed a copy of that opinion for your consideration.

From my perspective, the outcome of the litigation will be determinative with respect to the issue that you have raised. If a court finds that the Cornell University Board of Trustees is indeed subject to the Open Meetings Law to the extent that I suggested, I believe that the faculty meetings that you have described would also be subject to the Open Meetings Law. Contrarily, if the court disagrees with my opinion and determines that the Cornell University Board of Trustees is outside the scope of the Open Meetings Law, a similar conclusion must be reached with regard to the ILR faculty meetings. In short, since the faculty of the School of Industrial and Labor Relations is essentially an extension of the University Board of Trustees,

the application of the Open Meetings Law to the faculty meetings will rest largely upon the determination yet to be made with regard to the University Board of Trustees.

Assuming that the courts concur with my opinion and find that the University Board of Trustees is subject to the Open Meetings Law to the extent that it deliberates with regard to the four statutory colleges and the law enforcement functions, I believe that the faculty meetings in question would also be subject to the Open Meetings Law based upon the following reasoning.

Section 97(2) of the Law as amended defines "public body" to mean:

> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Viewing the definition in terms of its components, first, the faculty of the School of Industrial and Labor Relations consists of an entity for which a quorum is required. Specific quorum requirements are contained in part A.1 of the faculty legislation. It is noted that the membership of the faculty is fixed and identifiable as indicated by the roster that is prepared at the beginning of each academic year. Second, if, in the opinion of a court, the University Board of Trustees conducts public business, I believe that the faculty could also be considered to conduct public business, for it engages in policy-making for one of the statutory colleges. Third, the faculty consists of more than two members. And fourth, if the University Board of Trustees performs a governmental function for the state, I believe that the faculty would be performing a governmental function for the state as well.

In sum, it is reiterated that the status of the faculty meetings of the School of Industrial and Labor Relations under the Open Meetings Law is in my view contingent upon the outcome of the litigation regarding the University Board of Trustees. Again, if the University Board of Trustees is considered a public body with respect to its deliberations relative to Cornell's statutory colleges, I would contend that the faculty meetings are also subject to the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-408

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 23, 1979

Jay Martin Siegel, Esq.
[redacted]

Dear Mr. Siegel:

Thank you for your letter of November 6 and your interest in complying with the Open Meetings Law.

Your inquiry concerns the amended definition of "public body" and the application of the Law to committees and subcommittees. Specifically, you have asked how an executive session may be convened by a subcommittee of a governing body, which may consist of less than majority of the total membership of the governing body, when §100(1) of the Open Meetings Law requires that a majority of the total membership of a public body must pass a motion to enter into an executive session.

In my view, the question can be answered by viewing a committee or subcommittee of a governing body as a separate entity. For instance, if a school board, a governing body, consists of seven members, four would be required to convene a quorum, and the same number would be required to pass a motion to enter into executive session. If the board is broken into a number of committees or subcommittees which consist of three members, for example, a quorum of the committees or subcommittees would be a majority of their total membership, i.e. two, and a vote of two among the three would be sufficient for entry into an executive session.

This contention is in my view bolstered by the legislative history of the Open Meetings Law. Unlike most legislation, the Open Meetings Law was debated on the floor of the Assembly prior to its initial passage in 1976. During the debate, questions arose regarding the status of committees, subcommittees and similar groups. The sponsor of the bill, then Assemblyman Joseph Lisa, indicated that it was his intent that the definition of "public body" in its

original form should include committees and subcommittees. In the Assembly, which consists of 150 members, a committee might consist of 15. Since the Open Meetings Law went into effect in 1977, a quorum of such committees has been considered to be a majority of their total membership, rather than a total membership of the Assembly in its entirety. Further, the memorandum in support of the bill that was signed into law an Chapter 704 of the Laws of 1979, indicates that it was the intention of the sponsors, the Senate and Assembly Committees on Rules, that the inclusion of committees and subcommittees in the definition of "public body" was intended only to provide clarification.

In addition, the language of the definition of "public body" concerning quorum requirements is in my view largely surplusage. I direct your attention to §41 of the General Construction Law, which defines "quorum" and has been in effect since 1909. The cited provision states that:

> "[W]henever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the definition of "quorum", a majority of the total membership of any group of three or more public officers or persons charged with a duty to be performed jointly would constitute a quorum for the purpose of the Open Meetings Law. Therefore, a quorum of a committee designated to perform a duty as a body or collectively, is in my opinion a majority of its total membership.

In sum, to reiterate, I believe that a committee consisting of less than a majority of the total membership of a governing body should, for the purpose of compliance with the Open Meetings Law, be considered a distinct entity that has a quorum requirement based upon a majority of its total membership.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1316
OML-AO-409

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 26, 1979

Mr. Frank L. Spalik
[redacted]

Dear Mr. Spalik:

I have received your letter of November 12, which raises questions concerning the interpretation of both the Freedom of Information Law and the Open Meetings Law.

First, you have described a situation in which a letter pertaining to you was written by a member of the Board of Assessors and sent to the Windsor Town Board. You have indicated that it is your belief that the letter contains accusations concerning you. The question is how you may obtain a copy of the letter.

First, it is noted that the Freedom of Information Law is based upon a presumption of access. Specifically, §87(2) of the Law provides that all records in possession of an agency, such as a Town, are available, except those records or portions thereof that fall within one or more among eight grounds for denial enumerated in paragraphs (a) through (h) of the cited provision.

In my opinion, there is but one ground for denial that may appropriately be raised with respect to the letter in question. Section 87(2)(g) of the Law states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations."

It is emphasized that the quoted provision contains what in effect is a double negative. While government may withhold inter-agency materials (records transmitted from one agency to another) or intra-agency materials (records transmitted from an employee of an agency to another employee of the same agency), statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records must be made available.

Therefore, if the letter in question could be considered "intra-agency" in nature, those portions of the letter consisting of statistical or factual information, for example, should be made available to you.

In terms of procedure, I have enclosed a copy of the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law. Each agency in the state, including the Town, is required to adopt its own rules and regulations consistent with and no more restrictive than those promulgated by the Committee.

Your second question concerns the legality of holding meetings "pertaining to budgets or otherwise without informing the public by putting a notice in the newspapers". In this regard, §99 of the Open Meetings Law requires that notice be given prior to all meetings, whether regularly scheduled or otherwise. If a meeting is scheduled at least a week in advance, §99(1) requires that notice be given to the news media and posted in one or more designated public locations not less than seventy-two hours prior to a meeting. If a meeting is scheduled less than a week in advance, §99(2) of the Open Meetings Law requires that notice be given to the news media and posted in the same fashion as described earlier "to the extent practicable" at a reasonable time prior to the meeting. Therefore, it is clear that notice must be given to the news media and posted in one or more public locations prior to all meetings.

Third, the Open Meetings Law was recently amended (see attached memorandum). One of the changes concerns the definition of "meeting". Under the original Law, the state's highest court held that the definition of "meeting" includes any situation in which a quorum of a public body convenes for the purpose of conducting public business, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized (see Orange County Publications v. Council of the City of Newburgh, 45 NY 2d 947). From my perspective,

the amended definition of "meeting" merely codifies the holding of the Court of Appeals. As such, I believe that meetings held for the purpose of discussing a budget or other subject matter must be convened open to the public and preceded by notice given in accordance with §99.

Lastly, you stated in your letter that the Supervisor read the letter to which you referred earlier to the members of the Town Board "before the meeting, behind closed doors". Although it is possible that such a discussion might have been appropriate for executive session [see §100(1)(f)], §100(1) of the Open Meetings Law requires that an open meeting be convened prior to entry into executive session and that a vote must be taken during an open meeting in order to enter into executive session. Therefore, if your allegation is accurate, the Board's discussion of your letter prior to the meeting may have constituted a violation of the Open Meetings Law.

Enclosed for your consideration is a new pamphlet that may be useful to you entitled "The Freedom of Information and Open Meetings Laws...Opening the Door".

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

Encs.

cc: Town Board, Town of Windsor

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1319
OML-AO-410

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 28, 1979

Gene R. Matusow, M.D., P.C.
Greenridge Medical Pavilion
12 Greenridge Avenue
White Plains, New York 10605

Dear Mr. Matusow:

I thank you for your letter of November 13 and congratulate you on your recent election to the Town Board of the Town of North Castle.

Your first question concerns the application of the Open Meetings Law to chance meetings of members of the Town Board as well as meetings of a majority of the Town Board at political gatherings. In my opinion, the Open Meetings Law would not be applicable either to a chance meeting or a political caucus.

As you are likely aware, the Open Meetings Law was recently amended. One of the alterations in the Law concerns the definition of "meeting", which now includes "the official convening of a public body for the purpose of conducting public business" [§97(1)]. The new definition is in my view intended to reflect the Court of Appeals' decision in Orange County Publications v. Council of the City of Newburgh, 45 NY 2d 947, which held that any convening of a quorum for the purpose of discussing public business falls within the scope of the Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized.

The memorandum in support of the amendments to the Law submitted by the Assembly Committee on Rules states that the use of the word "official" in the definition was intended to "...avoid inadvertently including chance meetings and social gatherings." As such, if members of the Town Board

happen to run into each other and thereafter discuss public business, such a situation would not in my opinion constitute a "meeting".

Further, "quorum" is a term that is specifically defined by §41 of the General Construction Law. One of the conditions precedent to the convening of a quorum is a requirement that reasonable notice be given to each member of a public body. In the case of a chance meeting, notice would not be given to each member. In the case of a political caucus, assuming that a board does not consist entirely of members of one political party, again, reasonable notice would not likely be given to each member.

In addition, §103(2) of the Open Meetings Law exempts from its scope "deliberations of a political committees, conferences and caucuses."

The second question concerns minutes of executive sessions and who may have access to them. In this regard, I direct your attention to §101(2) of the Law, which provides that:

> "[M]inutes shall be taken as executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedomoof information law..."

In view of the foregoing, it is clear that minutes of executive sessions need not include reference to each and every comment made during an executive session. On the contrary, such minutes must consist only of "a record or summary of the final determination" of action taken during executive session, "and the date and vote thereon."

With respect to rights of access, subdivision (3) of §101 states that minutes of executive session shall be made available within one week of executive session. Generally speaking, §87(2)(g)(iii) of the Freedom of Information Law requires that final determinations made by an agency, which includes a town, must be made available. From my perspective, there are rare circumstances in which a portion of a determination would be deniable in the Freedom of Information Law. Nevertheless, if, for example, a determination made in executive session includes reference to the identity of a member of the public, and if disclosure would result in "an unwarranted invasion of personal privacy", the name or

other identifying details could likely be deleted. In such a situation, the public would have the ability to gain access to minutes reflective of the nature or substance of a determination after having deleted appropriate portions of the determination to protect personal privacy.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 411

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 28, 1979

Mr. Michael L. Rovello
Supervisor
Town of Mount Pleasant
One Town Hall Plaza
Valhalla, New York 10595

Dear Mr. Rovello:

Thank you for your letter of November 13 and your interest in complying with the Open Meetings Law.

Your first question is whether minutes of work sessions of the town board are required, or whether an agenda of the subjects discussed is sufficient. In this regard, I direct your attention to §101 of the Open Meetings Law concerning minutes. It is noted that the Law does not define what minutes must be, but rather prescribes minimum requirements concerning their contents. Specifically, subdivision (1) of the cited provision states that:

> "[M]inutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Based upon the foregoing, it is clear that minutes need not consist of a verbatim transcript of the entire discussion at a meeting, but rather only "a record or summary" of "motions, proposals, resolutions and any other matter formally voted upon..." Therefore, if a public body merely discusses public business at a "work session", but does not engage in the making of "motions, proposals, resolutions" or voting, presumably the minutes need not reflect the nature of the discussion. Therefore, if a work session consists merely

of a discussion as described earlier, I would agree that minutes would be sufficient if they included reference to the subjects discussed according to an agenda, the date, the members present, and the motion to adjourn.

The second question is whether if minutes are required to be compiled, it is the responsibility of the town clerk to perform such a duty. As you are aware, the state's highest court held that a "work session" or similar gathering is a "meeting" that falls within the scope of the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 45 NY 2d 947]. In brief, it was held that any convening of a quorum of a public body for the purpose of discussing public business is a "meeting", whether or not there is an intent to take action and regardless of the manner in which the gathering may be characterized. The amended definition of "meeting" [§97(1)] in my view merely codifies the judicial opinion cited.

The problem as I see it involves the interpretation of the Open Meetings Law in conjunction with §30 of the Town Law, which in subdivision (1) states in relevant part that the town clerk:

> "[S]hall have the custody of all the records, books and papers of the town. He shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting..."

Although the Town Law requires that the clerk be present at each meeting of the town board for the purpose of taking minutes, I do not believe that it would be reasonable to construe §30(1) to require the presence of a clerk at a work session during which there are no motions, proposals, resolutions or votes taken.

Section 30 of the Town Law was enacted long before the Open Meetings Law went into effect. Consequently, I do not feel that the drafters of §30 could have envisioned the existence of an extensive Open Meetings Law analogous to the statute now in effect. On the contrary, I believe that

§30 was intended to require the presence of a clerk to take minutes in situations in which motions and resolutions are introduced and in which votes are taken. If that is not the case with respect to work sessions, it is in my view unnecessary that a town clerk be present to take minutes.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-412

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 29, 1979

Mr. Paul A. Palmgren
[redacted]

Dear Mr. Palmgren:

Thank you for your most recent letter. Please accept my apologies for the delay in response, which I am pleased to report was due to the birth of my son.

The question presented in your letter concerns the status of so-called "informal" meetings held by the Board of Education prior to a regularly scheduled meeting. You intimated that there appears to be an intent to hold the "informal meetings" on an ongoing basis. Apparently public business is considered at the gatherings in question, despite the absence of notice given in conjunction with §99 of the Open Meetings Law.

It is noted in this regard that §97(1) of the Law as amended defines "meeting" as the "official convening of a public body for the purpose of conducting public business". From my perspective, the new definition of "meeting" was intended to be consistent with and confirm the direction provided by the Court of Appeals in Orange County Publications v. Council of the City of Newburgh, [45 NY 2d 947 (1978)]. In brief, the Court of Appeals affirmed an Appellate Division decision which held that any convening of a quorum of a public body for the purpose of discussing public business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized.

Although the meetings that are the subject of your inquiry may have been characterized as "informal" or perhaps as "unofficial", the memorandum in support of the amendments to the Open Meetings Law submitted by the Assembly Committee on Rules indicates that the inclusion of the word "official" was intended "to avoid inadvertently including chance meetings and social gatherings". Therefore, I do not believe that a meeting may be removed from the scope of the Open Meetings Law merely by characterizing it as "unofficial" or "informal".

Assuming that a quorum of the School Board convenes its "informal meetings" as a body for the purpose of discussing or conducting public business, the gatherings in my view fall within the scope of the definition of "meeting" and, therefore, the Open Meetings Law in all respects. Further, if the gatherings are indeed "meetings" subject to the Law, they must in my view be preceded by notice given pursuant to the direction provided by §99 of the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Mr. Cjubaj, Acting Superintendent

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1320
OML-AO-413

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 30, 1979

Mr. Anthony J. Spennacchio
Assistant Superintendent
for Administration
Gates Chili Central School
District
910 Wegman Road
Rochester, New York 14624

Dear Mr. Spennacchio:

I am in receipt of your letter of November 13 concerning the status of records in possession of the Advisory Task Force Committee on Declining Enrollment, which was created by the Gates Chili School District Board of Education.

It is noted at the outset that your letter was addressed to Mr. Gene Snay of the Committee on Public Access to Records. Please be advised that Mr. Snay is the records access officer for the State Education Department. I have sent a copy of your inquiry to Mr. Snay and he might want to respond to your inquiry as well.

According to your letter, the Advisory Task Force Committee on Declining Enrollment (hereafter "the Committee") was created by the Board of Education in November 1978. Your letter indicates that, following its formation, the Advisory Committee voted to have closed meetings due to the "confidential nature" of its discussion. In addition, although the School Board has freely provided access to the final report of the Committee, requests for minutes of the meetings of the Advisory Committee as well as "any charts, documents, data and other records of the Task Force may have utilized during its study" have been rejected by the Committee.

You have asked what your responsibilities might be with respect to requests for records still in possession of the Task Force. Your letter also indicates that the chairperson of the Committee has expressed his or her intention that the records sought are considered "confidential and will stay that way".

In my opinion, the facts as you have described them represent past violations of the Open Meetings Law and potential violations of the Freedom of Information Law.

First, with respect to the Open Meetings Law, I believe that the decision by the Committee to close its meetings represented a violation of the Open Meetings Law. It is emphasized that the Law as it existed until recently was different from the Law as it exists now due to the passage of amendments that became effective on October 1, 1979. While the scope of the definition of "public body" [§97(2)] was somewhat uncertain under the Law as originally enacted, I believe that the Committee was subject to the Open Meetings Law in all respects since its creation in 1978.

Under the original Open Meetings Law, "public body" was defined to mean:

> "any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

By breaking the definition into its components, this Committee consistently advised that committees analogous to that in question were subject to the Law. The committee in question was an entity consisting of more than two members. It was required to act by means of a quorum pursuant to the definition of "quorum" appearing in §41 of the General Construction Law. It is emphasized that the definition of "quorum" is applicable not only to groups consisting of public officers, but also to persons "charged with any public duty to be performed or exercised by them jointly by a board or similar body". Further, the Committee in question "transacted" public business. Although the Committee may not have had the capacity to take final action, the state's highest court affirmed an Appellate Division finding that the word

"transact" should be interpreted based upon its ordinary dictionary definition, i.e. "to discuss" [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947]. Lastly, it is clear that the Committee performed its duties for a public corporation, in this case a school district.

Moreover, in a similar situation, it was held judicially that a citizen's committee designated by a public corporation was a public body subject to the Open Meetings Law [see Pissare v. City of Glens Falls, Sup. Ct., Warren Cty. (1978)]. In discussing the issue, the court found that the members of a citizen's committee were "formally requested" to serve and further stated that:

> "[W]hile the members jointly and collectively did not have any authority and did not exercise any authority in the sense of taking final and binding action..., the members certainly had 'power' greater than that possessed by the other citizens of Glens Falls to influence the Common Council's decisions and deliberations...The Court holds that when persons are formally requested to advise the legislative and executive officers of a municipality and to assist legislative officers in deliberating that such persons are charged with a public duty (see General Construction Law §41)...Accordingly, these public bodies formally convened for the purpose of officially transacting public business whenever they gathered to foreseeably effect or actually effect the discharge of their public duty."

In view of the foregoing, I do not believe that the committee in question had the legal authority to close all of its meetings. This is not to say that executive sessions may not have been proper. If, for example, particular personnel were discussed or if the value of particular parcels of real property would be affected by public discussion, certainly such discussions would have been proper for executive session.

Nevertheless, all meetings of the Committee should have been convened as open meetings. To the extent that executive sessions could have been appropriately held, they should have been held by following the procedure for entry into executive session described in §100(1) of the Open Meetings Law.

Second, with respect to access to records, I believe that the records are in the legal custody of the School District, even though they may be in the personal custody of the Chairperson of the Committee.

Two statutes are cited to bolster this contention. Section 2116 of the Education Law has since 1947 stated that:

> "[T]he records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to be the property of such district and shall be open for inspection by any qualified voter of the district at all reasonable hours, and any such voter may make copies thereof."

In addition, §86(4) of the Freedom of Information Law defines "record" to mean:

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the direction provided by the two provisions quoted above, it is clear that the records in question now in possession of the Chairperson of the Committee are in the legal custody of the School District under §2116 of the Education Law and constitute "records" subject to rights of access under the Freedom of Information Law.

This is not to say that all records requested are available, for records or portions thereof might be properly denied based upon the categories for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law. In brief, that provision states that all records are available, except to the extent that records "or portions thereof" fall within one or more grounds for denial enumerated in the Law.

It is also emphasized that the word "confidential" is much over-used and in my opinion can be appropriately cited in but two circumstances. First, records are confidential when an act passed by the State Legislature or Congress specifically precludes an agency from disclosing. Such records are clearly deniable under §87(2)(a) of the Freedom of Information Law, which enables an agency to withhold records that are "specifically exempt from disclosure by state or federal statute". The other instance in which records may be deemed confidential would occur in a situation in which a court finds that an agency has proven that disclosure would, on balance, result in detriment to the public interest [see Cirale v. 80 Pine Street Corp., 35 NY 2d 113]. Under the circumstances, I do not believe that the records requested could be considered "confidential".

There may be portions of records which if disclosed would result in an "unwarranted invasion of personal privacy" under §§87(2)(b) and 89(2)(b) of the Freedom of Information Law. If so, identifying details might be deleted to protect privacy, while providing access to the remainder of the records.

Lastly, the records might be characterized as "intra-agency materials". In this regard, §87(2)(g) of the Law states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is emphasized that the quoted provision contains what in effect is a double negative. While an agency may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual data, instructions to staff that affect the public, or final agency policy or determination found within such records.

Although it is unlikely that the records requested contain instructions to staff that affect the public or final agency policy or determinations, it is quite likely that they contain "statistical or factual tabulations or data". To that extent, they are in my view accessible.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Mr. Gene Snay

bcc: Gates Chili News

An ERROR

No OML-414

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1326
OML-AO-45

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 11, 1979

Mr. Louis Muniente
[redacted]

Dear Mr. Muniente:

I have received both of your recent letters and apologize for the delay in response.

Your questions pertain to the responsibility of a school district with regard to the imposition of taxes. In this regard, you have asked how a school board may be restrained from passing higher budgets each year and expending increasing amounts of the taxpayers' money.

In all honesty, I have no expertise regarding the fiscal responsibilities of school boards. However, you mentioned "home rule" and questioned the capacity of school boards to keep raising taxes. As I understand it, the responsibility to keep school district expenditures in check rests on the shoulders of the public. Although the voters in your district may have passed budgets over the years, they could reject a budget. Further, if you disagree with the policy of a particular board member or members, perhaps you and others could combine to elect the representatives of your choice.

In addition, the two Laws administered by the Committee, the Freedom of Information Law and the Open Meetings Law, permit you to learn more about the factual bases for the making of policy, including the imposition of taxes.

For example, the Freedom of Information Law is based upon a presumption of access. In brief, that Law states that all records in possession of an agency, including a school district, are available, except those records or portions thereof that fall within one or more amoung eight

enumerated grounds for denial listed in the Law. Similarly, the Open Meetings Law requires that all meetings of public bodies, including school boards, must be open unless there is a ground for a closed or "executive" session. As in the case of the Freedom of Information Law, a meeting is presumed to be open, except to the extent that an executive session may properly be convened based upon the grounds for executive session listed in the Law.

Enclosed for your consideration are copies of both laws, as well as the pamphlet to which you made reference. I believe that these documents will be helpful to you. If you would like additional copies, I will be happy to provide them on request.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-416

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 11, 1979

Ms. Jean Yanarella
Reporter
The Cornwall Local
35 Hasbrouck Avenue
Cornwall, NY 12518

Dear Ms. Yanarella:

I have received your letter of November 30 which raises questions regarding the notice provisions of the Open Meetings Law.

Specifically, you have requested an opinion regarding the nature of notice that must be given when a municipal board "conducts a so-called 'special meeting'". In a similar vein, you have asked what action may be taken by an aggrieved party if a board fails to give notice.

I direct your attention to §99 of the Open Meetings Law, which, taken as a whole, requires that notice be given prior to every meeting of a public body, whether regularly scheduled or otherwise.

Subdivision (1) of §99 pertains to meetings scheduled at least a week in advance and states that notice of meetings must be given to the news media (at least two) and posted in one or more designated, conspicuous locations not less than seventy-two hours prior to the meetings.

Subdivision (2) of §99 states that notice of meetings scheduled less than a week in advance must also be given to the news media and posted in the same fashion as described above.

Although the Law does not specify how notice to the news media must be given, if, for example, an emergency or special meeting is called on short notice, I believe that a public body could accomplish its duties with regard to its responsibility to give notice to the news media by telephoning at least two representatives of the news media.

With respect to the action that may be taken if notice is not given, §102 of the Law in relevant part states that:

> "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body."

Based upon the quoted provision, if a failure to give notice is inadvertent, that failure alone cannot constitute a basis for invalidating action taken at a meeting of a public body. However, if it could be demonstrated that a failure to provide notice was intentional or has occurred on a continuing basis, I believe that such a showing could be cited for the proposition that a public body has constructively denied access to its meetings.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-412

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 11, 1979

Irving H. Glasgow
Asst. General Counsel
American Federation of State
County & Municipal Employees
AFL-CIO
140 Park Place
New York, NY 10007

Dear Mr. Glasgow:

I have received your letter of November 30 and appreciate your interest in compliance with the Open Meetings Law.

Appended to your letter is a bulletin of the New York Public Library which in part pertains to the extension of the Open Meetings Law to various libraries, including the New York Public Library. Apparently, the Board of Trustees of the New York Public Library has established a series of rules concerning its implementation of the Open Meetings Law. Relevant to your inquiry is the propriety of rule #2, which states that:

> "[V]isitors should not leave their seats unless they exit the meeting room. Visitors who leave their seats and exit the meeting room will not be reseated."

In my opinion, the rule quoted above is unreasonable and is contrary to the Open Meetings Law.

It is emphasized that the courts have long held that public bodies may adopt reasonable rules to govern their own proceedings. Nevertheless, in this instance, the clear intent of the Open Meetings Law as stated in its legislative declaration as well as its substantive provisions in my opinion preclude the issuance and negate the validity of the rule in question.

More specifically, I direct your attention to §98(a) of the Open Meetings Law, which states that:

> "Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section one hundred of this article."

The provision quoted above makes clear that any person has the right to attend any portion of a meeting open to the public. Further, it is clear that the only instance in which the public may be excluded from a meeting would involve the appropriate convening of an executive session pursuant to §100 of the Law. From my perspective, a proper executive session represents the only instance in which a member of a public may be excluded from a meeting. Consequently, a rule prohibiting an individual from reentering an open meeting after having left, for whatever reason, would violate the Law and would in my view be unreasonable.

In addition, the rule in question represents what may be considered a "constructive" denial of access to meeting of the Board of Trustees which also violates the clear direction provided by the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-418

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 12, 1979

Mr. David B. Frederickson
[redacted]

Dear Mr. Frederickson:

As you are aware, I have received your letter of November 22 in which you requested an advisory opinion regarding the status of the Buildings and Grounds Maintenance Committee of the Wappingers Central School District under the Open Meetings Law.

According to your letter, the Committee consists of nineteen members, fifteen of whom are district employees and four of whom are members of the public. You have indicated that the purpose of the Committee is to identify problems pertaining to buildings and grounds, to create a priority list of repairs and to report and recommend its findings to the Board of Education. You have also written that the creation of the Committee was suggested by Superintendent Sturgis and confirmed by the Board of Education.

I agree with your contention that the Committee in question is a "public body" that is subject to the Open Meetings Law in all respects.

It is noted that the status of advisory bodies such as committees and subcommittees had been somewhat uncertain under the Open Meetings Law as originally enacted. Nevertheless, recent amendments to the Law that became effective on October 1 make clear that committees, subcommittees and similar bodies fall within the provisions of the Open Meetings Law.

Viewing the problem from an historical viewpoint, §97(2) of the original Law defined "public body" to include:

> "any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

Under the quoted provision, this Committee consistently advised that committees and subcommittees were subject to the Law, even though they may have had no authority to take action, but rather only the authority to recommend or advise. This contention was based upon both a legal interpretation of the definition as well as the legislative history of the Law.

With respect to the original definition of public body, a committee such as the one in question could be considered an entity consisting of more than two members. It would be required to act by means of a quorum, even though there might be no specific direction to that effect. Section 41 of the General Construction Law, which was passed initially in 1909, defines "quorum" to pertain to any group of three or more public officers or persons designated to perform some public duty as a body. Further, such committees in my opinion "transact" public business even though they may have no authority to take final action. This finding was based upon the ordinary dictionary definition of "transact", which means "to discuss" or carry on business. This Committee's advice regarding the interpretation of the word "transact" was confirmed by the Court of Appeals in Orange County Publications v. Council of the City of Newburgh (60 AD 2d 409, aff'd 45 NY 2d 947). Lastly, the Committee in question performs a governmental function for a public corporation, in this instance a school district.

The legislative history of the original definition also provides an indication of an intent to include committees and subcommittees within the scope of the Law. During the debate on the floor of the Assembly, the sponsor of the legislation was asked whether it was intended that the definition of "public body" include "committees, subcommittees and other sub-groups." He answered in the affirmative in each of the three instances in which the question was raised.

Notwithstanding the rationale presented above, the Appellate Division, Third Department, in Daily Gazette v. North Colonie Board of Education held that committees and subcommittees were not subject to the Law on the ground that such groups had no capacity to take final action (412 NYS 2d 494, ___ AD 2d ___).

Due to the Daily Gazette decision, which conflicted with the clear statement of intent expressed by the sponsor of the legislation, the Legislature sought to clarify the Law by amending the definition of "public body". Section 97(2) of the amended statute defines "public body" to include:

> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

It is noted that the word "transact" has been substituted with the word "conduct" in order to erase problems that have arisen regarding the status of bodies with only the power to recommend. In addition, the last clause of the definition makes specific reference to "committees, subcommittees and similar bodies."

Moreover, the memorandum in support of the legislation introduced by its sponsors, the Senate and Assembly Committees on Rules, indicates that the amendments include:

> "[A]n expansion in the definition of public body to specify, as we intended and indeed so stated in the Assembly debate, the inclusion of committee or subcommittee or other similar body of a public body; and to substitute the word 'conduct' for 'transact' as a more precise description of those activities carried on at public meetings.

In my view, the amendment to the definition of "public body" was intended to effectively reverse the Daily Gazette decision and make clear that a committee, such as the Buildings and Groups Maintenance Committee, should be included within the scope of the Law.

In sum, I believe that the Committee in question must convene its meetings open to the public, provide notice in compliance with §99 of the Open Meetings Law and otherwise comply with the Law in all respects.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Sturgis
President, Board of Education

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1329
OML-AO-419

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 13, 1979

Mr. Raymond W. Russo
[redacted]

Dear Mr. Russo:

As you are aware, I have received your letter of December 3 as well as the correspondence appended to it. Your inquiry concerns a request for "the entire record" relative to a complaint made against Dr. Peter Schaad, a veternarian, "including the minutes and vote of the State Board for Veterinary Medicine and any correspondence with the Attorney General's Office."

In response to your request, Gene Snay, the Assistant Records Access Officer for the Department of Education, answered that your request was denied pursuant to §65.10 (sic) of the Education Law and §87(2)(a) of the Freedom of Information Law.

Having reviewed the correspondence, I agree in part with Mr. Snay's determination, but it is clear that his response to you dealt only with one aspect of your request.

It is true that §6510 of the Education Law requires that administrative warnings made by professional conduct officers must be kept confidential. Consequently, an administrative warning is beyond the scope of rights of access granted by the Freedom of Information Law, for §87(2)(a) of the Freedom of Information Law enables an agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute." Under the circumstances, since the Education Law requires that an administrative warning be confidential, it is in my view specifically exempted from disclosure.

Nevertheless, you requested not only the administrative warning, but any other records related to the complaint made against Dr. Schaad. Since I am not familiar with the nature of the records that may exist, I can only conjecture as to rights of access.

It is important to point out, however, that the Freedom of Information Law is based upon a presumption of access. In brief, §87(2) of the Law states that all records in possession of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial enumerated in §87(2)(a) through (h) of the Law. In my opinion, there are three grounds for denial that may be relevant to your request for records other than the administrative warning. To the extent that those grounds for denial may properly be cited, the Education Department may justifiably withhold records or portions of records from you.

The first ground for denial is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law lists five examples of unwarranted invasions of personal privacy. It is noted at this juncture that the privacy standard is flexible and is subject to conflicting interpretations. For example, while one reasonable man might believe that disclosure of a particular record would result in an unwarranted invasion of personal privacy, an equally reasonable man might consider that disclosure of the same record would result in a permissible invasion of personal privacy.

It is possible that portions of the records in which you are interested would if disclosed result in an unwarranted invasion of personal privacy. For instance, if witnesses came forward to offer testimony or evidence, I believe that their names or other identifying details could be withheld. However, the privacy provisions do not in my view enable the Education Department to protect the records in their entirety for the following reasons. It is clear that you know the identity of the person against whom the complaint was made, for you made the complaint. Moreover, the records compiled with respect to the complaint are relevant to the manner in which the Education Department and its components perform their duties; they are also relevant to the manner in which a person licensed by the state performs his duties. In order to obtain a

a license, a person must meet specific standards designed by government. From my perspective, it is in the public interest to know whether the standards are being met. I contend that the public interest in knowing whether the standards are met diminishes the capacity of an agency to withhold information on the ground that disclosure would result in "an unwarranted invasion of personal privacy."

The second ground for denial of relevance is §87 (2)(e) which states that an agency may withhold records or portions thereof that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confiden . information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my opinion, the provision quoted above could not appropriately be cited to withhold the records, even though an investigation may have been made. Under both the Freedom of Information Law as originally enacted and as amended, the courts have held that the "law enforcement purposes" exception may be raised only by a criminal law enforcement agency [see e.g., Young v. Town of Huntington, 388 NYS 2d 978 (1976); Broughton v. Lewis, Sup. Ct., Albany Cty. (1978)]. While the Education Department may engage in a law enforcement function, it is not a criminal law enforcement agency. Moreover, the specific grounds for denial listed in §87(2)(e) can no longer arise, for the investigation has been completed and the case has been closed.

Finally, §87(2)(g) of the Freedom of Information Law states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is important to note that the quoted provision contains what in effect is a double negative. While an agency may withhold inter-agency or intra-agency materials, it must disclose statistical or factual data, instructions to staff that affect the public, or agency policy or determinations found within such records.

Under the circumstances, it is doubtful that the records contain instructions to staff or statements of policy. The determination that was made, the administrative warning, is confidential under §6510 of the Education Law. However, the records may contain statistical or factual data. For example, the Education Department may have prepared or developed a number of records in response to the investigation which contain "factual data". Although they may be considered intra-agency materials, the factual data contained within such materials would be available unless a different exception to rights of access could properly be raised. Similarly, records transmitted between the Education Department and the Department of Law would be considered "inter-agency materials". Again, however, to the extent that they consist of statistical or factual data, instructions to staff, or agency policy or determinations, they are available.

With respect to minutes and votes, assuming that a board or committee or similar body dealt with the complaint, it is possible that such an entity may have created records relative to the complaint, such as minutes or a record of votes. Ordinarily, the meetings of public bodies must be convened as open meetings pursuant to the provisions of the Open Meetings Law. However, §103(1) of the Open Meetings Law provides that quasi-judicial proceedings are exempted from the Open Meetings Law. Since the proceedings of a board or committee would under the circumstances be quasi-judicial in nature, they would fall outside the scope of the Open Meetings Law.

However, §87(3)(a) of the Freedom of Information Law requires that each agency maintain "a record of the final vote of each member in every agency proceeding in which the member votes." In this regard, while a quasi-judicial body might not be required to adhere to the provisions of the Open Meetings Law, it would nonetheless be required to compile a record of the votes of each member and how the member voted in every instance in which a vote was taken. Therefore, if any vote was taken, a record of that vote should be compiled and available to you.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gene Snay

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-420

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 13, 1979

Mr. Samuel A. Weissmandl
Executive Director
Yeshiva of New Square
91 Washington Avenue
New Square, New York 10977

Dear Mr. Weissmandl:

As you are aware, I have received your letter of November 29, which reached this office too late for a response to be given as promptly as you requested. Nevertheless, based upon our conversation this morning, you requested an opinion in order to have direction should similar controversies arise in the future.

Your inquiry concerns the scope of §100(1)(d) of the Open Meetings Law, which permits a public body to hold an executive session to discuss "proposed, pending or current litigation". Specifically, you have asked whether the exception in question is applicable to discussions by a school board relative to its preparation for a hearing to be held before the Commissioner of Education. The question essentially is whether discussions pertaining to the hearing pertain to "litigation" or rather to what you have characterized as "administrative recourse".

In my opinion, the pendency of a controversy to be heard at a hearing to be held by the Commissioner of Education does not constitute the pendency of litigation. The word "litigation", according to several legal dictionaries is grounded upon the notion that litigation involves a "contest in a court of justice for the purpose of enforcing a right". A hearing held before the Commissioner of Education would not in my view constitute "litigation", for the Commissioner is not a judge, nor is the Education Department a court.

Based upon the foregoing, I believe that §100(1)(d) may appropriately be cited for entry into executive session only in situations in which legal strategy is discussed pertaining to an ongoing lawsuit pending before a court or an imminent controversy that will be heard before a court.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: East Ramapo School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-421

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 19, 1979

Nelson F. Eaton
Mayor
Village of Avoca
Avoca, New York 14809

Dear Mayor Eaton:

Thank you for your letter of November 26 and your interest in complying with the Open Meetings Law.

You have asked whether the Village Board of Trustees may meet in private for the sole purpose of reviewing a tentative budget.

While I appreciate your concerns as well as your interest in efficiency in government, I feel compelled to advise that a meeting of the Board of Trustees held for the purpose of discussing the tentative budget must in my opinion be convened as an open meeting. As you may be aware, the Court of Appeals, the State's highest court, more than a year ago held that any convening of a quorum of a public body for the purpose of discussing public business falls within the framework of the Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publication v. Council of the City of Newburgh, 45 NY 2d 947]. Moreover, I believe that the amendment to the definition of "meeting" [see attached, Open Meetings Law, §97(1)] is intended to codify the holding of the Court of Appeals.

Although it is apparently clear that a meeting to discuss a tentative budget must be open to the public, it is important to point out that the Law permits the public to attend and listen to the deliberations of a public body; it is silent with regard to public participation at a meeting. Therefore, I believe that a public body may preclude public participation or interruptions at a meeting.

In addition, should the public attend a meeting held to discuss the tentative budget, it might be worthwhile to mention publicly that the document under discussion is non-final in nature and is subject to substantial change.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 422

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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DOUGLAS L. TURNER
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 19, 1979

Mrs. Margaret Morahan
[redacted]

Dear Mrs. Morahan:

Thank you for your letter of December 4 and your interest in complying with the Open Meetings Law.

You have asked whether a school board may hold closed "planning sessions, budget workshops and committee meetings".

While I appreciate your concerns as well as your interest in efficiency in government, I feel compelled to advise that any meeting of a school board or its committees, held for the purpose of discussing public business must in my opinion be convened as an open meeting. As you may be aware, the Court of Appeals, the State's highest court, more than a year ago held that any convening of a quorum of a public body for the purpose of discussing public business falls within the framework of the Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 45 NY 2d 947]. Moreover, I believe that the amendment to the definition of "meeting" [see attached, Open Meetings Law, §97(1) and explanatory memorandum] is intended to codify the holding of the Court of Appeals.

Although it is clear that a meeting must be convened open to the public, it is important to point out that the Law permits the public to attend and listen to the deliberations of a public body; it is silent with regard to public participation at a meeting. Therefore, I believe that a public body may preclude public participation or interruptions at a meeting.

It is also important to note that the definition of "public body" appearing in §97(2) of the Law makes specific reference to "committees and subcommittees" that conduct public business. Therefore, the Open Meetings Law is applicable not only to a school board, a governing body, but also to its components, or groups that have been designated by a board to perform a public duty collectively.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1344
OML-AO-423

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 20, 1979

Mrs. Gail D. Bradley
Village Clerk
Village of Macedon
Macedon, New York 14502

Dear Mrs. Bradley:

Thank you for your letter of December 12 and your interest in complying with the Open Meetings Law.

You have asked a series of questions regarding the Zoning Board of Appeals of the Village if Macedon in conjunction with the Open Meetings Law.

First, it is important to note at the outset that the deliberations of a zoning board of appeals may be considered "quasi-judicial" in nature. In this regard, §103(1) of the Open Meetings Law states that quasi-judicial proceedings are exempt from the Open Meetings Law. Stated differently, the Open Meetings Law does not apply to those aspects of a public body's duties that may be considered "quasi-judicial".

Nevertheless, even though a village zoning board of appeals may engage in quasi-judicial proceedings, the exemption in the Open Meetings Law concerning such proceedings is in my view of no effect with respect to a village zoning board of appeals.

Section 105(2) of the Law provides that any other provision of law less restrictive than the Open Meetings Law remains in effect. One such provision is §7-712 of the Village Law, which has long required that "[A]ll meetings of such board shall be open to the public". Due to the direction provided by §7-712 of the Village Law, it has been consistently advised that village zoning boards of appeals must conduct their meetings open to the public.

It is noted that litigation is pending concerning the same issue relative to a town zoning board of appeals. In this regard, §267(1) of the Town Law provides virtually the same language as §7-712 of the Village Law and directs that all meetings of town zoning boards of appeals must be open to the public (see Matter of Katz, Sup. Ct., Westchester Cty., NYLJ, June 25, 1979). To further explain the legal issues involved, I have enclosed an earlier advisory opinion on the subject as well as a copy of the decision rendered in Katz.

Assuming that the Katz decision is correct, meetings of a zoning board of appeals should be preceded by notice given in accordance with §99 of the Open Meetings Law.

Further, in the Orange County case cited in my earlier opinion, the Appellate Division held that the portion of a meeting which involves the making of a decision and the taking of votes is not quasi-judicial and must be conducted in public [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Specifically the court stated that:

> "[W]e agree with Special Term that there is a distinction between that portion of a meeting of the zoning board wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly nonjudicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" (id. at 418).

Finally, secret ballot voting is prohibited. Section 87(3)(a) of the Freedom of Information Law, which concerns access to records, requires that each agency maintain "a record of the final vote of each member in every agency proceeding in which the member votes". Therefore, in each instance in which the zoning board of appeals votes, a record must be compiled which identifies each member and how that person voted.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO- 424

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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DOUGLAS L. TURNER
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 20, 1979

George E. Port, Jr., Ed.D.
Superintendent of Schools
Somers Central School District
Somers, New York 10589

Dear Dr. Port:

I have received your letter of December 10 and thank you for your interest in complying with the Open Meetings Law.

You have presented a procedure that might be followed when a member of the School Board requests that an executive session be held and raised questions relative to its propriety. I am in general agreement with the procedure, but I would like to offer the following comments.

First, "executive session" is defined by §97(3) of the Open Meetings Law as that portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law requires that a motion to enter into executive session be made during an open meeting, carried by a majority of the total membership of a public body, and identify in general terms the subject matter proposed for discussion behind closed doors. In addition, as you are aware, paragraphs (a) through (h) of §100(1) specify and limit the areas of discussion appropriate for an executive session. Therefore, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof.

In a related sense, I do not feel that a public body can schedule an executive session in advance, for it cannot be known until a meeting is convened whether a sufficient number of votes will be cast to enter into executive session.

Second, with respect to notice, §99(1) of the Law provides that meetings scheduled at least one week in advance must be preceded by notice given to the news media (at least two) and posted in one or more designated, conspicuous public locations. Section 99(2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and posted in the same manner as described earlier, "to the extent practicable" at a reasonable time prior to the meeting. As such, if an emergency arises, a public body is not restricted to a twenty-four hour limitation before it can hold a meeting. On the contrary, a meeting may be held immediately, so long as notice is given "to the extent practicable". For example, if it is necessary to convene a meeting tonight, for whatever the reason might be, the Board could accomplish its responsibilities under the Open Meetings Law by posting its notice and telephoning at least two members of the news media.

Lastly, if a majority of the total membership of a public body does not vote to enter into executive session, a board has two options. It may discuss the matter in public, or the issue could be tabled to an ensuing meeting during which there may be a sufficient number of votes to carry a motion to enter into executive session.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO- 425

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 31, 1979

Ms. Annette La Belle
[redacted]

Dear Ms. La Belle:

I have received your most recent letter and the correspondence attached to it addressed to Alfred Del Bello, Westchester County Executive.

Once again, your inquiry concerns attempts to open meetings of committees of the County Legislature. You have indicated that "committees are still holding unposted and unpublicized 'informal' meetings and are not keeping minutes."

Although the status of committees, subcommittees and similar groups was somewhat unclear under the Open Meetings Law as originally enacted, amendments to the Law that went into effect on October 1 leave no room for doubt regarding the coverage of such entities. Specifically, §97(2) of the Open Meetings Law as amended defines "public body" to include:

> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based upon the foregoing, it is clear that committees and subcommittees are subject to the Law. In addition, it is noted that the word "transact" that appeared in the original definition of "public body" has been removed and replaced with the word "conduct".

Moreover, while the original Open Meetings Law did not specify how notice to the public must be given, §99 of the Law now requires that public bodies post notice in one or more designated, conspicuous public locations. Consequently, each public body, which includes a committee, must designate one or more locations where notice of meetings will always be posted.

Enclosed for your consideration are copies of the amended Open Meetings Law, a memorandum explaining the amendments to the Law, and a pamphlet that outlines your rights under both the Freedom of Information and Open Meetings Laws.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

cc: Peggy Blum
Milton Byer
Alfred Del Bello